Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

CAL-ALMOND, INC., BAL NUT INC., CENTRAL VALLEY GROWER PACKING, HOCKER NUT FARM, JARDINE ORGANIC RANCH, ROTTEVEEL ORCHARDS, THERON SHAMOCHIAN INC., BEARDS QUALITY NUT CO., AMARETTO ORCHARDS and CARLSON FARMS,

Petitioners,

v.

U.S. DEPARTMENT OF AGRICULTURE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment is violated by a mandatory advertising program under which the government imposes financial penalties on private industry members whose own advertising does not satisfy content-based standards, or who choose to remain silent.

RULE 29.6 STATEMENT

None of the petitioners has any parent corporations, and no publicly held company owns 10% or more of any of petitioners' stock.

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Petitioners, ten almond handlers, respectfully ask this Court to issue a writ of certiorari to review the decision of the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a), is reported at 192 F.3d 1272 (9th Cir. 1999). The opinion of the district court (App. B, 12a) is unreported. The opinion of the U.S. Department of Agriculture judicial officer (App. D, 23a) is unreported. The opinion of the administrative law judge (App. E, 144a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 21, 1999. A timely petition for rehearing was denied on November 12, 1999 (App. G, 275a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech."

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 601 *et seq.*, as amended) are set forth at App. H, 276a. The relevant post-1993 Almond Marketing Order regulations are set forth at App. I, 293a. The relevant pre-1994 advertising regulations are set forth at App. J, 309a.

STATEMENT OF THE CASE

This case involves a government-mandated advertising program in which almond handlers who convey a commercial message selected by the government pay less, while almond growers who choose to remain silent, or convey a message other than that selected by the government, pay more. This content-based financial burden on protected commercial speech goes beyond anything approved by this Court in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), and is fundamentally at odds with the freedom of speech guaranteed by the First Amendment.

A. Advertising Provisions in Federal Marketing Orders

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, as amended (the "Act"), establishes a regulatory program for certain agricultural commodities, including almonds. Among other things, the Act authorizes compulsory "marketing promotion including paid advertising" for the commodity. *Id.* § 608c(6)(I). Advertising programs are administered by industry boards whose members are appointed by the Secretary of Agriculture (the "Secretary"). *Id.* §§ 608c(7)(C), 610. The costs of these advertising programs are paid by assessments imposed on all handlers of the particular commodities (*id.* § 610(b)(2)(ii)).

These advertising programs are of two different types, as set forth in two different subsections of the Code of Federal Regulations for each marketing order adopted by the Secretary. The first type, *see, e.g.*, 7 C.F.R. § 981.41, is a mandatory program in which all handlers of the commodity pay assessments to their industry boards, which use those

assessments to produce and disseminate generic advertising promoting the covered products. This type of program was upheld in *Wileman*.

The second type of advertising program, *see, e.g.*, 7 C.F.R. § 981.441, which was not at issue in *Wileman*, allows handlers a "choice": they must either advertise their own products in accordance with restrictions specified by regulations adopted by the Secretary and applied by the industry board, in which case they receive a total or partial credit against their assessments, or they may pay the full assessment to the Board for generic product advertising just as under the mandatory assessment program. The criteria for creditability are content-based, highly restrictive, and significantly favor the dominant cooperative in the industry, as described more fully below.

B. The California Almond Industry And The Almond Marketing Order

The California almond industry is made up of two types of producers and handlers. By far the largest producer and handler in the industry is Blue Diamond Growers, Inc. ("Blue Diamond"), an agricultural cooperative. *See* App. at 217a; *see also Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 438 & n.9 (9th Cir. 1993) (found at App. F, 228a). Between 1986 and 1991, Blue Diamond handled more than 50% of all California almonds produced annually; its market share for subsequent years, although slightly diminished, was still significant. *See* App. at 217a. Blue Diamond supplies approximately 90% of all almonds sold to retail customers as snacks or for home cooking, both through other retailers and through its own independently-operated retail outlets. *See* App. at 217a. Petitioners, in contrast, process and sell

nearly all of their almonds for use as ingredients in products such as candy, ice cream, or cereal; they also export a significant portion to overseas buyers. *See* App. 158a, 165a-213a. Petitioners sell few or no almonds at domestic retail as snacks or for home cooking, and they do not operate retail outlets. *See ibid.*

Overall, the vast majority of all almonds grown in California are sold as ingredients for other products; candies, cereal, and ice cream are the three largest uses of almonds as ingredients. *Ibid* and App. 221a. Almonds sold for domestic consumption as snacks represent just a small percentage of overall sales of California almonds. *Ibid.*

California almond growers and handlers are subject to an almond marketing order, 7 C.F.R. Pt. 981, issued by the U.S. Department of Agriculture pursuant to the Act. The almond marketing order imposes assessments upon handlers based on the tonnage of almonds handled. *Id.* § 981.81(a). The marketing order authorizes these assessments to be spent on general advertising, promotion, and marketing of almonds "designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of almonds." *Id.* § 981.41(a); 7 U.S.C. § 608c(6)(I). Per-handler assessment amounts are sizable; for the 1997-1998 crop year, for example, estimated assessments for the approximately 100 almond handlers subject to the almond marketing order were $13 million, of which $8.5 million was budgeted for advertising, marketing, and promotion. *See* Almonds Grown in California, 63 Fed. Reg. 39,755-39,756.

The marketing order is administered by the California Almond Board. *Id.* § 981.38. The Board is made up of ten members, who are industry representatives appointed by the

Secretary. *Id.* §§ 981.30, 981.31. Because of its dominant position as the largest cooperative producer and handler in the industry, Blue Diamond has held between four and six seats at all times since 1986, giving it effective control of the Board.[1] App., 217a. Furthermore, because changes in the Board's advertising and promotional policy require the approval of seven out of ten Board members, 7 C.F.R. § 981.40(e), Blue Diamond has had veto authority over Board-run advertising and promotion throughout all the years in question.

The almond marketing order gives handlers credit for any amounts they spend independently on **authorized** advertisements, up to the total amount of assessments used for advertising and marketing under the marketing order. *Ibid.*; 7 C.F.R. § 981.41(c). Virtually all of the assessments imposed by the Board between crop years 1985-1986 and 1995-1996 were used for advertising, marketing, and promotional activities under the marketing order.

For crop years 1986-1987 through 1992-1993, the marketing order had "creditability" provisions, which gave a handler 100% credit against its assessment for monies spent both for generic advertising and for advertising its own brand. 7 C.F.R. § 981.41(c); *id.* §§ 981.441(c)(3)(i)(A) and (B) (1992). (App. 309a *et seq.*) To earn credit, however, the advertising had to satisfy the extensive requirements of the

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1. Under the almond marketing order, Blue Diamond — as the largest cooperative producer and handler in the almond industry — receives at least four seats on the Board regardless of the volume of almonds it handles. *See* 7 C.F.R. §§ 981.31(a)(1), (b)(1). It receives six seats in crop years in which it handles more than 50% of the annual tonnage of California almonds, *id.* § 981.31(c), as was the case between 1986 and 1991. App. 217a.

creditable advertising regulations, 7 C.F.R. § 981.441 (1992). No credit was available for advertising that referred to "more than two complementary branded products"; for advertising that promoted "noncomplementary" products or "competing nuts"; or for advertising that "direct[ed] consumers to one or more named retail outlets" not operated by the handler. 7 C.F.R. § 981.441(c)(5) (1992). In addition, under 7 C.F.R. § 981.441(c)(3)(iv) (1992):

> When almond products, other than almond butter, are advertised, the credit shall be 50 percent of the total allowable payment to the advertising medium or 50 percent of the handler's payment thereof, whichever is less: *Provided*, That (A) the almond product does not contain nuts other than almonds, (B) the almond product contains at least 50% raw shelled almonds by weight, and (C) the almond product displays the handlers' brand.

The effect of these restrictions was to allow handlers to receive a credit for advertising almonds for retail to consumers but to disallow credits for advertising almonds as ingredients.[2] Thus, for example, petitioner Cal-Almond, Inc., whose domestic sales of almonds are almost all for use in ice cream (App. 166a, 172a-175a), could not receive credit for its domestic advertising because almonds do not make up 50% of the net weight of the package of ice cream.

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2. Handlers were also given 100% credit for advertisements in a foreign market, but only if the advertisements were (i) made pursuant to a contract with the Foreign Agricultural Service, the U.S. Department of Agriculture, or the California Department of Food and Agriculture; or (ii) the advertisements were "brand" advertisements — *i.e.*, promoted a specific brand of almonds such as "Blue Diamond." 7 C.F.R. § 981.441(c)(4) (1992).

7 C.F.R. § 981.441(c)(3)(iv) (1992). By contrast, Blue Diamond could obtain full credit for advertising its own brand, and then benefit a second time when the Board used the assessments paid by producers of ingredient almonds to run "generic" ads promoting the retail sales of almonds for consumption — where Blue Diamond has a 92% market share. As the Ninth Circuit recognized in 1993, "there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers * * * who sell primarily to ingredient manufacturers." *Cal-Almond*, 14 F.3d at 440. (App. F, 228a, 249a-250a)

In 1993, the Secretary proposed amendments to the marketing order provisions governing creditable advertisements. *See* Almonds Grown in California, 58 Fed. Reg. 43,500 (1993). Those amendments, with additional changes, were made final in 1994. *See* Almonds Grown in California, 59 Fed. Reg. 35,222 (1994) (codified at 7 C.F.R. § 981.441). The amended marketing order was enacted over numerous objections by handlers of California almonds (including Cal-Almond), the Small Business Administration, and others that the almond advertising program was ineffective and unfairly skewed in favor of handlers (most notably, Blue Diamond) who sell almonds for retail consumption.[3] *See* 59 Fed. Reg. 35,222.

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3. The Small Business Administration contended that regulations were harmful to small handlers, most of whom sell their almonds to be used as ingredients in other products, because handlers were not given full credit against their assessments for advertising designed to increase ingredient use. *See* 59 Fed. Reg. 35,222, 35,230 (1994).

Section 981.441, as amended, contains a "credit-back" scheme: handlers receive credit for only two-thirds of the amounts spent on creditable advertising and promotion (rather than the 100% credit provided for under the prior regulation). 7 C.F.R. § 981.441(a) (1994). (App. I, 293a, 302a.) The definition of creditable advertising remains subject to strict content-based criteria. Advertisements of almonds must be "directed to end-users, trade or industrial users" in order to be creditable. *Id.* § 981.441(e)(4)(i). If an advertisement promotes a product containing almonds, its cost is creditable only if the product "display[s] the handler's name or brand, or the words 'California Almonds[,]' on the primary face label"; even then, the handler receives credit only for the portion of the advertisement's cost equivalent to the proportion of almonds in the product. *Id.* § 981.441(e)(iv). The cost of advertisements for "complementary products" such as mixed nuts or trail mix is creditable only if "the handler's name or brand, or the words 'California Almonds' " appear in the ad, and again, only that portion of the cost equivalent to the proportion of almonds in the complementary product is creditable. *Id.* § 981.441(e)(iii).

Under these new regulations, if Cal-Almond — which sells almonds for use as ingredients in products such as Dryer's ice cream — attempts to increase demand for almonds by spending $300,000 to advertise toasted almond ice cream (which contains 3-6% almonds) (App. 174a), it receives a "credit-back" of between $6,000 and $12,000 against its mandatory assessment. Furthermore, no credit is given unless Dryer's includes the words "Cal-Almond" or "California Almonds" on the front label of each ice cream container.[4]

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4. There are other restrictions as well. A handler does not receive credit, for example, for advertising in publications that target (Cont'd)

Under both current and former regulations, almond handlers seeking credit against their marketing order assessments must file claims with the Board for approval. The Board is authorized to reject a claim — even if an advertisement satisfies the content-based criteria set forth in Section 981.441 — if it finds that the advertisement's "clear and evident purpose" is not "to promote the sale, consumption or use of California almonds." 7 C.F.R. §§ 981.441(a), (c)(2) (1992); 7 C.F.R. §§ 981.441(a), (e)(2) (1994). For creditability determinations prior to 1994, aggrieved handlers had no statutory right of review. Under the 1993-1994 revisions, handlers may request review of an adverse decision by the Board, with a right of appeal to the Secretary. *Id.* § 981.441(f).

C. Procedural Background

1. In 1994, Cal-Almond and the other petitioners filed administrative petitions with the U.S. Department of Agriculture, alleging that the mandatory advertising program and its creditable advertisement provisions violated their First Amendment rights. Petitioners sought recovery of assessments used for advertising from crop years 1986-1994 onwards, and an injunction against continued enforcement of the mandatory advertising program. All petitioners also sought recovery of assessments dating back to crop year

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(Cont'd)
"the farming or grower trade." *Id.* § 981.441(e)(3). Billboard advertisements are not permitted in eleven California counties — not coincidentally, counties in which large quantities of California almonds are grown — unless the advertisement "directs consumers to a handler-operated outlet offering direct purchase of almonds." As noted above, Blue Diamond operates several retail stores; petitioners operate none.

1986-1987. App. 146a. Cal-Almond's creditable assessments for just two years were approximately $650,000 (App. 173a); in total, petitioners sought well over four million dollars for credit-back and creditable advertising assessments paid to the Board. (App. 173a-213a.)

The petitions were heard by an Administrative Law Judge ("ALJ"), who made extensive findings of fact based on a record developed in seven days of hearings, at which 43 witnesses testified and 300 exhibits were introduced. *Id.* 144a.

The ALJ first determined that the marketing order advertising program and creditability regulations, although nominally designed to benefit all almond growers, did not do so. The ALJ found that overall advertising for almonds prior to 1991 was "dominated" by Blue Diamond: between crop years 1987-1988 and 1990-1991, the total expenditure by the Almond Board for generic advertising, promotion, and marketing ranged from $840,000 to $1,400,000 per year; during the same period, Blue Diamond spent between $8 and $14.2 million per year on its own, branded advertising. *Id.* at 157a.

Furthermore, the ALJ found, Blue Diamond would have continued to advertise its brand in the absence of the marketing order. The significant discrepancy in advertising expenditures thus created a risk that Blue Diamond's non-advertising competitors would undercut its prices. *Id.* 157-158a. The almond marketing order solved this problem by "requir[ing] Blue Diamond's competitors to make equivalent expenditures" in the form of mandatory assessments under the almond marketing order. *Id.* 158a.

Blue Diamond could continue to run its own branded advertisements aimed at the retail almond market, and receive full credit against marketing order assessments under 7 C.F.R. § 981.441(c) (1992). *Id.* 158-160a. Its competitors could not pursue a similar advertising strategy, because they sold almonds for use as ingredients and advertisements designed to increase this market were not creditable under 7 C.F.R. § 981.441(c) (1992). *Id.* 158a-162a, 172a, 226a.

Neither the generic advertising program nor the few creditable activities that almond growers other than Blue Diamond engaged in, the ALJ found, increased demand for almonds. *Id.* 157a-163a, 217a-226. To the extent the Board's generic advertising had any effect, it was primarily to benefit Blue Diamond, since the generic ads were aimed at the retail, end-user market dominated by Blue Diamond. *Ibid.*[5]

On the basis of these factual findings, the ALJ concluded that the challenged advertising program violated the First Amendment under the three-part test for commercial speech restrictions set forth in *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 564 (1980). Under *Central Hudson*, the ALJ held, the government was required to demonstrate (i) the existence of a substantial government interest; (ii) that the challenged speech restriction directly advanced the government interest; and (iii) that the speech restriction was not more extensive than necessary. App. 155a-165a, 226-227a.

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5. The ALJ noted that, under the 1994 revisions of the marketing order, more money was expected to be available for generic almond advertising. App. 162a. It concluded, however, that there was no evidence that this program — unlike all previous almond advertising — would be effective at increasing demand.

The ALJ agreed that the government has a substantial interest in stimulating demand for almonds in order to enhance returns to producers and stabilize the health of the almond industry. *Ibid.* Nonetheless, it held, there was no evidence that the challenged program furthered that interest; to the contrary, the evidence showed that the only interests furthered by the program were those of Blue Diamond as compared to its competitors. *Id.* 152a-160a, 162a, 216a-226a. Finally, the ALJ concluded, the strict content-based limits on giving credit against mandatory assessments for a handler's own advertisements, and the lack of correlation between those limits and the government's purported interest, showed that the challenged speech restrictions were more extensive than necessary. *Id.* 163a-165a, 226a-227a. Accordingly, the ALJ held, the challenged provisions of the almond marketing order, including both pre-1994 and current versions of the regulations, were unconstitutional. *Ibid.*

2. The U.S. Department of Agriculture appealed the ALJ's decision to the USDA's judicial officer, who stayed the proceedings pending the U.S. Supreme Court's decision in *Wileman*, which upheld the constitutionality of mandatory funding by all industry members of a program of industry-wide generic advertising.[6] Following the *Wileman* decision, the judicial officer reversed the ALJ, and held that *Wileman* foreclosed petitioners' First Amendment claims. App. D, 23a at 128a-139a.

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6. As noted above, the *Wileman* decision upheld the constitutionality of the first type of marketing orders, which require all industry members to fund generic advertising but do not apply content-based restrictions — with corresponding financial burdens and benefits — on industry members' own commercial speech. This case, in contrast, involves the constitutionality of financial credits against those mandatory assessments based on the content of the industry member's own speech.

3. Petitioners filed suit in the U.S. District Court for the Eastern District of California, seeking a declaration that the almond marketing order, 7 C.F.R. Pt. 981, violated their First Amendment rights. App. B, 12a. The district court dismissed the claims pursuant to *Wileman*.

4. On appeal, the Ninth Circuit affirmed dismissal of petitioners' First Amendment claims. App. A, 1a. The court first asked whether *Wileman* was dispositive, a question which required consideration of

> (1) whether the advertising programs impose a restraint on Cal-Almond's freedom to communicate any message to any audience; (2) whether the advertising programs compel Cal-Almond to engage in any actual or symbolic speech; and (3) whether the advertising programs compel Cal-Almond to endorse or finance any political or ideological views that are not germane to the purposes for which the compelled association is justified.

App. 5a.

The Ninth Circuit held that the challenged program did not restrain Cal-Almond's freedom to communicate an advertising message of its choice because it did not directly prohibit non-creditable advertisements. It deemed conclusive on this point *Wileman*'s holding that the First Amendment is not violated by " 'an economic regulation [that] may indirectly lead to a reduction in a handler's individual advertising program.' " App. 6a-7a (quoting *Wileman*, 521 U.S. at 470).

The court next considered, and rejected, Cal-Almond's assertion that the marketing order's financial incentives and disincentives impermissibly compelled speech. Because Cal-Almond and the other dissenting handlers could choose not to engage in commercial advertising but instead to pay the mandatory assessment, the court reasoned, no compelled speech was involved. App. 8a. The court treated as irrelevant the adverse financial consequences stemming from the choice to remain silent rather than convey the government-selected message. *Ibid.*

Finally, the Ninth Circuit reasoned, Cal-Almond's objections to the government-required message were not political or ideological in nature, and the advertising at issue was "germane" to the Act's purpose of promoting consumption of almonds. *Id.* 99a-10a. Accordingly, it upheld the challenged program. *Id.* 11a.

5. In an entirely separate action, filed several years before the initiation of these proceedings, two of the petitioners in this action, Cal-Almond and Carlson Farms, joined by two other almond handlers who are not parties in this case, submitted administrative petitions challenging the constitutionality of the almond marketing order's generic advertising program and creditability provisions. After exhausting administrative remedies, they sought review in the U.S. District Court for the Eastern District of California, which dismissed the action. On appeal, the Ninth Circuit reversed in part, holding that both the generic and the creditable advertising programs violate the First Amendment. *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 434-408, 449 (9th Cir. 1993). (App. F, 228a.)

The case was remanded to the district court, which ordered the government to pay $4.3 million. The Ninth Circuit, on appeal, affirmed in part and reversed in part. *Cal-Almond, Inc. v. Department of Agric.*, 67 F.3d 874 (9th Cir. 1995). The government then petitioned for a writ of certiorari, asking that, in light of its then-pending petition for a writ of certiorari in *Glickman v. Wileman Bros. & Elliott, Inc.*, No. 95-1184 (filed Jan. 1996), the Court dispose of the *Cal-Almond* petition in accord with its disposition of *Wileman*. U.S. Pet'n for Cert., *United States Dep't of Agriculture v. Cal-Almond, Inc.*, No. 95-1879 (filed May 1996). This Court granted the petition in *Wileman* and reversed the Ninth Circuit, holding that the generic advertising program in the plum marketing order did not violate the First Amendment. 521 U.S. 457 (1997). It then granted the government's petition in *Cal-Almond*, vacating the Ninth Circuit's decision and remanding for further consideration in light of the decision in *Wileman*.

On remand, without considering additional briefs or submissions, the Ninth Circuit issued an order stating: "This case is REMANDED to the district court with instructions to dismiss Cal-Almond's First Amendment claim. *See Glickman v. Wileman Bros. & Elliott, Inc.*" Cal-Almond and the other plaintiffs then petitioned for a writ of certiorari, arguing that the Ninth Circuit had improperly refused to consider differences between the generic advertising program upheld in *Wileman* and the content-based creditability provisions challenged in the case before it. *Cal-Almond, Inc. v. U.S. Dep't of Agriculture*, No. 97-1935 (filed June 1998). The petition was denied. 119 S. Ct. 57 (1998). We assume that the denial is attributable to the interlocutory nature of the appeal. *See Columbia Union College v. Clark*, 119 S. Ct. 2357, 2358-2359 (1999) (Thomas, J., dissenting from denial of cert.).

REASONS FOR GRANTING THE WRIT

This case presents a question of vital importance under the First Amendment: whether the government can impose a financial assessment on agricultural handlers based on the content of their commercial advertising. Under the challenged advertising program, almond handlers who convey a government-approved message — a message that, not coincidentally, benefits one dominant industry member to the detriment of its competitors — receive substantial financial credit against their mandatory assessment. Almond growers who refuse to convey this government-approved message, either by remaining silent or by selecting their own message, must pay.

The Ninth Circuit's approval of this outcome is irreconcilable with basic First Amendment principles. Freedom of speech is presumptively violated by government regulation of the content of private citizens' speech; the same rule applies whether the government regulates speech directly, by banning or requiring a particular message, or instead uses financial incentives to accomplish indirectly the same end. It is undeniable that, under the standard applied to content-based restrictions of commercial speech, the challenged regulations must be struck down.

The Ninth Circuit's reflexive and unthinking invocation of the *Wileman* holding — a decision which not only fails to support the challenged advertising regulations, but affirmatively demonstrates their constitutional flaws — merely illustrates the need for this Court's review. The Ninth Circuit converted the limited holding in *Wileman* into a blank check for content-based commercial speech restrictions, including what amounts to regulation of the content of the

speaker's own advertising, in violation of this Court's statement of the holding in *Wileman*. This Court, as the only forum that can clarify its decision, and protect petitioners' constitutional rights, should do so.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDINGS

1. The creditable and credit-back advertising programs at issue in this case impose rewards and penalties based on the content of the handlers' own speech. If a handler's advertisements pass muster in the eyes of the Almond Board, it receives a 100% or two-thirds credit (under the pre-1993 and current regulations, respectively) against the portion of its mandatory assessment used by the Board for advertising, marketing, and promotions. If its advertisements do not meet with the Board's approval, or if the handler chooses not to advertise (and instead spends its money on other, effective means of promoting almond consumption), it must pay the full assessment. The program thus constitutes both a compulsion to speak and a content-based judgment on what to say, backed up by substantial financial rewards and penalties.

As this Court has repeatedly recognized, "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time*, 468 U.S. 641, 648-649 (1984); *accord, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 116 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987). Although content-based regulations are not *per se* unconstitutional, they are presumptively invalid under the First Amendment. *See Simon & Schuster*, 502 U.S. at 115; *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

The government's use of financial incentives and disincentives to accomplish content-based regulation does not alter this constitutional analysis, for "the government * * * may not seek to achieve an unlawful end either directly ***or indirectly***." *Elrod v. Burns*, 427 U.S. 347, 359 n.13 (1976) (plurality opinion) (emphasis added); *see also, e.g., American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950) ("indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights" as outright bans). To put the point more succinctly, First Amendment "[r]ights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Elrod*, 427 U.S. at 359 n.13. Indeed, one of the crucial concerns of the Founders — a concern that ultimately led to adoption of the Bill of Rights — was that the government would use content-based taxation of the press to eliminate disfavored messages even if did not ban the messages outright. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 584-585 & n.6 (1983).

When the government gives favorable financial treatment to certain speech, it "provides a significant incentive toward more expression"; conversely, government denial of financial incentives places "a significant burden on expressive activity" and "chills potential speech before it happens." *United States v. National Treasury Employees Union*, 513 U.S. 454, 468-469 (1995). Because this result is disfavored under our constitutional system, which protects a "marketplace of idea," laws "impos[ing] differential [financial] burdens upon speech because of its content" are subject to the same scrutiny as content-based bans on that speech. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622,

642 (1994); *see also, e.g., National Treasury Employees Union*, 513 U.S. at 469-470; *Simon & Schuster*, 502 U.S. at 116; *Leathers*, 499 U.S. at 447.

Admittedly, the speech at issue in this case is commercial, rather than political or ideological. But truthful, non-misleading commercial speech is protected under the First Amendment. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496-97, 501, 518, 528 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 638 (1985); *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Bates v. State Bar*, 433 U.S. 350, 363-366 (1977); *Virginia State Bd. of Pharmany v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-762 (1976). The strong societal interest in free speech extends to commercial advertisements as well as to political and ideological speech:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Edenfield v. Fane, 507 U.S. 761, 767 (1993); *see also Virginia Pharmacy*, 425 U.S. at 764.

This Court has applied the same level of scrutiny to bans and content-based financial disincentives both where regulated speech is entitled to the protection of strict scrutiny, and where the speech receives lesser protection. In *National*

Treasury Employees Union, the Court recognized that "Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large," holding that government speech restrictions would be upheld so long as the government's interest, " 'as an employer, in promoting the efficiency of the public services it performs through its employees' " outweighed the employee's interest " 'in commenting upon matters of public concern.' " *National Treasury Employees Union*, 513 U.S. at 465-466 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). Notwithstanding the lower standard of review applicable to restrictions on government employees' speech, the Court applied the principle articulated in *Simon & Schuster* and *Turner Broadcasting* — that content-based financial burdens on speech are subject to the same level of scrutiny as bans on that speech. 513 U.S. at 468-469.

The same principle governs here. Because the creditable and credit-back regulations impose a content-based financial burden on commercial speech, they must be scrutinized under the *Central Hudson* test. Under that test, it is exceedingly improbable that they could be upheld.

The challenged regulations do not even come close to satisfying the *Central Hudson* requirement that commercial speech restrictions directly advance the governmental interest asserted. As the ALJ pointed out below, the government's interest in stimulating demand for almonds, while substantial, is not furthered one whit by the challenged advertising program, "whose essential purpose * * * was not to engage in generic advertising and promotion, but rather to induce expenditures by all handlers equivalent * * * to those

expended by Blue Diamond for its brand advertising." App. 157a-160a. To the extent that content-based financial incentives for advertising could further the government's interest, the strict limits on what advertising is creditable, and the apparently arbitrary connection between these content-based limits and the government's interest in increasing demand for almonds, show that the limits are more extensive than necessary to further than interest. *Id.* 163a-165a.[7] And Blue Diamond's own advertisements, to the extent that they are furthered by the content-based regulations, do not increase overall consumption of almonds. The ALJ's unequivocal factual findings on this point (App. 158a-162a, 224a-226a) merely prove the correctness of this Court's observation in *Wileman* that "[i]ndependent advertising [is] primarily motivated by the individual competitor's interest in maximizing its own sales, rather than in increasing the overall consumption of a particular commodity." 521 U.S. at 475.

2. Rather than apply the *Central Hudson* test to the challenged restrictions, the Ninth Circuit invoked the holding and analysis in *Wileman* as establishing their constitutionality. But the First Amendment issue presented here is fundamentally different from the issue resolved in *Wileman*. Far from supporting the Ninth Circuit's disposition of petitioners' claims, *Wileman* confirms that the creditable

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7. That the Board's generic advertisements promoted retail almonds — to the primary, if not exclusive, benefit of Blue Diamond — suggests that ***none*** of the marketing order program, including both the mandatory advertisements and the creditability regulations, were designed to further the economic interests of almond growers. For almond growers other than Blue Diamond, the program creates a scenario of "Heads I win, tails you lose."

and credit-back advertising regulations violate the First Amendment.[8]

In *Wileman*, the Court held that three characteristics of the mandatory assessment program it was considering distinguished it from laws that abridge the freedom of speech:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.

521 U.S. at 469-70 (footnotes omitted). Under the first two of these three criteria, the creditable and credit-back advertising programs violate the freedom of speech.

a. First, as discussed above, the challenged creditable and credit-back advertising programs ***do*** impose a restraint on the freedom of the producer to communicate the message of his choice to the public, the Ninth Circuit's holding to the contrary notwithstanding. The mandatory assessment program upheld in *Wileman* had no effect on the handlers' own speech. The handlers simply paid assessments into a fund, which was used to promote all products through generic advertising. The program involved no scrutiny of the handlers' own speech; it offered neither incentive for speaking in one way nor disincentive for speaking in another.

8. The analysis of the four dissenting Justices in *Wileman* would apply with even greater force to the creditable advertising program. *See* 521 U.S. at 477-478 (Souter, J., dissenting); *id.* at 504 (Thomas, J., dissenting).

The amount of the assessment was wholly unaffected by the handler's own speech.

Here, in contrast, some messages entitle a handler to monetary credit and other messages force the handler to pay the full assessment. As noted above, this Court has repeatedly recognized that financial incentives or burdens based on the content of speech are constitutionally suspect. *See* pages 15-16, *supra*. This fundamental distinction renders inapplicable the analysis and holding in *Wileman*.

The Ninth Circuit relied on the *Wileman* Court's observation that the First Amendment is not violated by an " 'economic regulation' " that " 'may indirectly lead to a reduction in a handler's individual advertising program' " to uphold the challenged regulations App. 6a-7a (quoting *Wileman*, 521 U.S. at 470). But of course, the regulations at issue here are ***not*** "economic regulation[s]," nor is their effect on handlers' advertising programs "indirect." By imposing content-based restrictions on truthful, nonmisleading advertising, and by tying those restrictions to the assessment amounts that industry members are required to pay, the challenged program imposes a direct tax on disfavored commercial speech. By couching the question as one of reduced resources for speech, rather than acknowledging that the challenged regulation imposed a direct financial burden on disfavored speech, the Ninth Circuit missed the point — and, in the process, radically broadened the scope of *Wileman*. Surely that case was not intended to permit any and all content-based restrictions on commercial speech, so long as they are enforced through financial incentives rather than a flat ban.[9]

9. Moreover, the Ninth Circuit utterly ignored the findings of the ALJ that the program was intentionally designed to benefit Blue (Cont'd)

b. Second, unlike the advertising program in *Wileman*, the challenged regulations in this case ***do*** compel handlers to engage in actual speech, on penalty of payment of a greater assessment. In *Wileman*, handlers had to pay their full assessment whether they engaged in their own advertising or not. In this case, the program imposes the functional equivalent of a fine or tax on handlers who do not advertise or — more importantly — do not advertise in the manner dictated by the government.

The Ninth Circuit appeared to believe that financial incentives of this type were not relevant because Cal-Almond and the other petitioners were not literally forced to speak the government-approved message. The court characterized petitioners as "free to advertise or otherwise communicate any message that [they] desire[ ] in any matter that [they] desire[ ]" — albeit only by suffering the financial consequences of refusing to convey the approved government message. App. 8a. As noted above, this distinction between banning or mandating speech directly, and accomplishing the same end through content-based financial assessments, is unsupportable.

c. Finally, the challenged advertising program involves an additional constitutional flaw not present in *Wileman*: the administration of content-based restrictions by a Board dominated by one company, Blue Diamond, whose interests are diametrically opposed to those of petitioners. App. 165a; R. 135-139. Every penny of petitioners' advertising deemed not to satisfy the Almond Board's criteria is a penny more to advertise Blue Diamond's retail almond business. To vest

(Cont'd)
Diamond, at the expense of other handlers in the industry (including petitioners), an important fact totally absent in *Wileman*.

the power to exercise subjective judgments about the content of private speech in a non-neutral decisionmaker with a financial interest in deeming the content of that speech "unacceptable," violates fundamental principles of freedom of speech. *See Air Line Pilots Ass'n v. Miller*, 118 S. Ct. 1761 (1998) (noting that *Central Hudson* requires " 'an impartial decisionmaker' "); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-136 (1992); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 (1986). *Cf. Gibson v. Berryhill*, 411 U.S. 564, 578-579 (1973).

In sum, the Ninth Circuit's decision upholding the creditable and credit-back advertising programs cannot be reconciled with the limits imposed by this Court on content-based speech incentives; nor can it be reconciled with *Wileman*. Its disregard of basic First Amendment principles warrants further review.

II. THIS CASE RAISES IMPORTANT AND RECURRING ISSUES

1. The Ninth Circuit's decision has far-ranging impact for content-based regulation of commercial speech in marketing orders. Under the Act, the Secretary is authorized to establish credit programs for many other regulated agricultural commodities subject to mandatory assessments, including raisins, walnuts, olives, filberts, and Florida Indian River grapefruit. 7 U.S.C. § 608c(6)(I). Acting on this authority, the Secretary has adopted numerous marketing orders that incorporate content-based credits against mandatory assessments, each of which applies only to handlers within the jurisdiction of the Ninth Circuit. *See, e.g.*, 7 C.F.R. § 932.45(a)(2) (California olives); § 982.58(b) (filberts and hazelnuts from Oregon and

Washington); and § 989.53(b) (California raisins). The practical effect of this case, therefore, is to establish in one fell swoop the constitutionality of each of these programs — which do not differ in any manner that would be relevant under the Ninth Circuit's analysis below. That result — and the serious First Amendment questions it raises — should be reviewed by this Court.

2. The Ninth Circuit's reflexive invocation of *Wileman* to uphold financial penalties for government-disfavored commercial speech provides an additional reason why this Court should grant review. There is widespread confusion among lower courts and commentators about the proper scope and applicability of *Wileman*. Lower courts have diverged sharply, for example, on whether *Wileman* permits mandatory funding of generic advertising only in industries subject to comprehensive economic regulation, or whether it also permits mandatory funding of stand-alone advertising programs. Compare *Goetz v. Glickman*, 149 F.3d 1131 (10th Cir. 1998); *Gallo Cattle Co. v. California Milk Advisory Bd.*, 185 F.3d 960 (9th Cir. 1999), with *United Foods, Inc. v. United States*, 197 F.2d 221 (6th Cir. 1999). *Wileman* has also been heavily criticized by academic commentators,[10]

10. *See, e.g.*, Fried, *Perfect Freedom, Perfect Justice*, 78 B.U. L. REV. 717, 743 (1998); Note, *Glickman v. Wileman Bros. & Elliott, Inc.: Has The Supreme Court Lost Its Way?*, 27 STETSON L. REV. 1461, 1484 (1998); Note, *Constitutional Law C Forced Advertising: Free Speech Or Not Even?*, 33 LAND & WATER L. REV. 779, 789 (1998); Goach, *Free Speech And Freer Speech: Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), 21 HARV. J.L. & PUB. POL'Y 623, 632 (1998); Casenote, *Commercial Speech — Compelled Advertising*, 111 HARV. L. REV. 319, 320, 325-326 (1997); Comment, *The Effect of Glickman v. Wileman Brothers & Elliott, Inc. on Nongeneric Commodities: A Narrow Focus on a* (Cont'd)

many of whom fear that it could open the floodgates to government interference with the marketplace of commercial ideas. Decisions like the Ninth Circuit's ruling below give credence to those warnings and add to the growing uncertainty. Yet on its own terms, the *Wileman* decision was carefully limited to generic advertising programs that were part of a comprehensive economic regulatory scheme. 521 U.S. at 469, 474-477. This case provides the opportunity for this Court to show the constitutional import of those limits, and to demonstrate that *Wileman* did not — despite the contrary views of lower courts and commentators — overrule *sub silentio* the Court's prior commercial speech cases.

(Cont'd)

Broad Rule, 9 SAN JOAQ. AG. L. REV. 95 (1999); Comment, *Glickman v. Wileman Brothers & Elliott, Inc.: Don't Put Words in my Mouth*, 33 New Engl. L. Rev. 989 (1999); SMOLLA & NIMMER, FREEDOM OF SPEECH § 20:45, at 20-114 (1998); Casarez, *Don't Tell Me What To Say: Compelled Commercial Speech and the First Amendment*, 63 Mo. L. REV. 929, 960-965 (1998); Note, *Leading Case: Freedom of Speech and Association Clauses: Commercial Speech — Compelled Advertising*, 111 HARV. L. REV. 319, 324-329 (1997).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 99-

IN THE

Supreme Court of the United States

CAL-ALMOND, INC., BAL NUT INC., CENTRAL VALLEY GROWER PACKING, HOCKER NUT FARM, JARDINE ORGANIC RANCH, ROTTEVEEL ORCHARDS, THERON SHAMOCHIAN INC., BEARDS QUALITY NUT CO., AMARETTO ORCHARDS and CARLSON FARMS,

Petitioners,

v.

U.S. DEPARTMENT OF AGRICULTURE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98-16921
D.C. No. CV-98-05049-REC/SMS

CAL-ALMOND INC.; GOLD HILLS NUT COMPANY INC.; FRAZIER NUT FARMS INC.; BAL NUT INC.; CENTRAL VALLEY GROWER PACKING; HOCKER NUT FARM; JARDINE ORGANIC RANCH; ROTTEVEEL ORCHARDS; THERON SHAMOCHIAN INC.; BEARDS QUALITY NUT CO.; AMARETTO ORCHARDS; CARLSON FARMS,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Chief District Judge, Presiding

Argued and Submitted
July 14, 1999 — San Francisco, California

Filed September 21, 1999

Appendix A

Before: Stephen Reinhardt, Diarmuid F. O'Scannlain and William A. Fletcher, Circuit Judges.

Opinion by Judge O'Scannlain

* * *

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether an almond marketing order violates the First Amendment by imposing mandatory assessments on individual almond handlers to fund collective generic almond promotion.

I

Cal-Almond, Inc., et al. (collectively "Cal-Almond"), are almond handlers subject to an almond marketing order ("Almond Order") issued by the United States Department of Agriculture ("USDA") pursuant to the Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601 *et seq.* ("Act"). The Almond Order imposes assessments upon handlers based on the tonnage of almonds handled, and a substantial portion of the assessments is used to fund generic advertising, promotion, and marketing of almonds. The Almond Order affords almond handlers the option of directly advertising their own products in certain specified ways, for which they can receive credit against their assessments. More specifically, credit can be received for promotional activities, such as advertising directed at "end users, trade or industrial

users," 7 C.F.R. § 981.441(e)(4)(i), so long as "[t]he clear and evident purpose of each activity shall be to promote the sale, consumption or use of California almonds," *id.* § 981.441(e)(2). Prior to the 1993-94 crop year, handlers could receive 100% credit for their own direct advertising pursuant to the "creditable" advertising program. Beginning with the 1993-94 crop year, handlers could receive only two-thirds credit for their own direct advertising pursuant to the "credit-back" advertising program. *See id.* § 981.441(a).

Cal-Almond filed an administrative petition with the USDA alleging that the creditable and credit-back advertising programs violated its First Amendment rights. The ALJ upheld Cal-Almond's First Amendment challenge to the advertising programs, relying on our decision in *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 14 F.3d 429 (9th Cir. 1993) ("*Cal-Almond I*"), which held that the creditable almond advertising program constituted compelled speech that violated the almond handler's First Amendment rights, *see id.* at 440. Both parties appealed the ALJ's decision to the USDA's judicial officer, who stayed the proceedings pending the Supreme Court's decision in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997) ("*Wileman*").

In *Wileman*, the Court upheld mandatory assessments for generic advertising of California tree fruits as "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." *Id.*, 521 U.S. at 477. In turn, the Supreme Court granted certiorari in *Cal-Almond I*, vacated this court's decision, and remanded for reconsideration in light of *Wileman*. *See United States Dept.*

of Agriculture v. Cal-Almond, Inc., 521 U.S. 1113 (1997) ("*Cal-Almond II*"). We, in turn, remanded *Cal-Almond I* to the district court with instructions to dismiss the First Amendment challenges to the advertising programs, citing *Wileman*. *See Cal-Almond, Inc. v. Dept. of Agriculture*, No. 94-17160 (9th Cir. Sept. 4, 1997) ("*Cal-Almond III*").

In light of the Supreme Court's decision in *Wileman* and *Cal-Almond II*, and our remand for dismissal in *Cal-Almond III*, the USDA's judicial officer reversed the ALJ's decision in this case and held that *Wileman* foreclosed Cal-Almond's First Amendment claims. Cal-Almond sought review in the United States District Court for the Eastern District of California, which also held that Cal-Almond's claims were foreclosed by *Wileman*. Cal-Almond subsequently brought this appeal.

II

Cal-Almond asserts that the *Wileman* analysis does not apply here because the Supreme Court considered the constitutional validity of purely mandatory assessments for generic advertising, while this case concerns the constitutional validity of assessments for generic advertising that are not purely mandatory because credit against the assessments is provided for certain forms of branded advertising. In *Gallo Cattle Co. v. California Milk Advisory Bd.*, __ F.3d __ (9th Cir. July 14, 1999) ("*Gallo*"), we explained that, in order "[t]o determine whether *Wileman* is dispositive of the claims asserted by [a party], we will go through the same analytical steps that the Court used in *Wileman*." *Id.* at __ (applying *Wileman* analysis and rejecting

Appendix A

First Amendment challenge to mandatory assessments imposed under dairy promotion program that included generic and branded advertising). Thus, in order to determine whether *Wileman* is dispositive here, we must again go through the *Wileman* analytical steps.

Following *Gallo*'s lead, we first examine the statutory scheme under which the mandatory assessments for almond marketing were imposed to determine whether constraints have been placed upon the handlers' independent action. *See id.* at __. After assessing the statutory context, we proceed to *Wileman*'s tripartite test, which determines whether the creditable and credit-back advertising programs abridge Cal-Almond's First Amendment rights, or are "instead part of a 'regulatory scheme' subject to review only as an economic regulation." *Id.* We must consider (1) whether the advertising programs impose a restraint on Cal-Almond's freedom to communicate any message to any audience; (2) whether the advertising programs compel Cal-Almond to engage in any actual or symbolic speech; and (3) whether the advertising programs compel Cal-Almond to endorse or finance any political or ideological views that are not germane to the purposes for which the compelled association is justified. *See id.*

A

The Act confers on the Secretary of Agriculture the power "to establish and maintain [ ] orderly marketing conditions for agricultural commodities." 7 U.S.C. § 602(1). Pursuant to this mandate, the Secretary is empowered to "[e]stablish or provid[e] for the establishment of production

research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of almonds, among other commodities. *See id.* § 608c(6)(I). Thus, as in *Gallo* and *Wileman*, it would appear that the almond handlers are "part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme," *id.*, 521 U.S. at 469, nor, indeed, does Cal-Almond dispute in its briefs on appeal whether handlers are so regulated.

B

Cal-Almond asserts that the assessments imposed under the Almond Order restrict its freedom to communicate by limiting the money that it has for advertising; most of Cal-Almond's other objections to the creditable and credit-back advertising programs also boil down to the impact that the assessments imposed under those programs have on its advertising budget. Cal-Almond effectively concedes that purely mandatory assessments would be constitutional under *Wileman*, but asserts that the credit option renders the assessments here unconstitutional. Cal-Almond contends that because it is less likely to receive credit for advertising that suits its purposes, its advertising budget is limited as compared to its competitors.

In *Gallo*, however, we expressly rejected the argument that a decrease in a producer's advertising budget constitutes a limitation on speech, stating that "although the assessments made under the Marketing Order may, as Gallo argues, 'substantially reduce the amount of money Gallo has to spend

on its own advertising used to distinguish its own product,' this 'incidental effect of constraining the size of [Gallo's] advertising budget' does not itself amount to a restriction on speech." *Id.* at __. This portion of our holding in *Gallo* followed necessarily from *Wileman*, wherein the Supreme Court made plain that "[t]he fact that an economic regulation may indirectly lead to a reduction in a handler's individual advertising budget does not itself amount to a restriction on speech." 521 U.S. at 470.

The Almond Order does not impose a restraint on Cal-Almond's freedom to communicate because Cal-Almond remains "free to advertise or otherwise communicate any message that it desires in any manner that it desires to any audience that it desires." *Gallo*, __ F.3d at __. Cal-Almond's assertion that the credit programs have a disparate impact upon the various handlers' advertising budgets is not relevant to the *Wileman* analysis. As the Supreme Court made plain:

> Similar criticisms might be directed at other features of the regulatory orders that impose restraints on competition that arguably disadvantage particular producers for the benefit of the entire market. Although one may indeed question the wisdom of such a program, its debatable features are insufficient to warrant special First Amendment scrutiny.

Wileman, 521 U.S. at 474.

Appendix A

C

Cal-Almond asserts that the creditable and credit-back programs compel speech because the Almond Board dictates how individual handlers must conduct their direct advertising if they wish to receive credit against their assessments. We are not persuaded, however. Because almond handlers remain free to choose whether and how to advertise directly, it cannot be said to constitute compelled speech. Handlers can decline to advertise directly and simply pay their assessments. They can directly advertise in an attempt to receive credit against their assessments. Or, they can directly advertise regardless of whether they will receive credit. *Cf. Gallo*, __ F.3d at __ (holding that the requirement that producers display promotional seal in order to fully benefit from generic advertising campaign did not constitute compelled speech because producers remained "free to choose not to carry the seal"). Rather than supporting Cal-Almond's assertion that *Wileman* is distinguishable, the flexibility provided by the creditable and credit-back programs instead supports the conclusion that the assessments here are indeed constitutional.

The program upheld in *Wileman* imposed purely mandatory assessments and therefore provided little recourse to those producers who objected to the messages disseminated, questioned the wisdom of the way the assessments were spent, or doubted the efficacy of generic advertising. By contrast, the programs here potentially accommodate objectors: handlers who object to generic advertising or believe there is a more cost-effective means of promoting almonds have the option of performing their

own direct advertising for which they may receive credit against their assessments. Thus, the creditable and credit-back programs potentially limit the extent to which almond handlers must fund advertising to which they object, and if the handlers cannot receive credit for their preferred form of direct advertising, they can simply pay the assessments and will be no worse off than the producers in *Wileman*.

D

Cal-Almond attempts to distinguish *Wileman* based on its objection to the messages funded by the assessments and the messages for which credit may be received. As *Gallo* makes plain, however, regardless of whether Cal-Almond has legitimate ideological objections to those messages, those objections do not render the advertisements compelled speech in violation of the First Amendment so long as the messages are germane to the purposes of the Almond Order and the Act. *See id.*, __ F.3d at __. Here, there can be no dispute that messages, generic or branded, promoting almond sales are germane to the Almond Order's and the Act's purpose, which is "to assist, improve, or promote the marketing, distribution, and consumption" of almonds. 7 U.S.C. § 608c(6)(I); *cf. Wileman*, 521 U.S. at 476 ("Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme."); *Gallo*, __ F.3d at __ ("The [ ] employment of a generic advertising campaign of California Milk and dairy products . . . is obviously 'germane' to [the California dairy marketing order's] purposes.").

Moreover, at base, Cal-Almond's objections to the advertising programs and the assessments imposed thereunder do not appear to be ideological or "to engender any crisis of conscience." *Wileman*, 521 U.S. at 472. Instead, Cal-Almond questions the effectiveness of the advertising programs and the messages funded by the assessments. More specifically, Cal-Almond objects to the Almond Board's generic advertising for snack almonds, because Cal-Almond does not sell snack almonds. *Wileman*, however, makes plain that such challenges to the wisdom or effectiveness of a promotional program raise questions of economic policy, rather than questions of constitutional import:

> Neither the fact that respondents may prefer to foster [a] message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message. The mere fact that objectors believe their money is not being well spent "does not mean [that] they have a First Amendment complaint."

Id. (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 456 (1984)).

Cal-Almond also objects to the provision of credit against the assessments for branded direct advertising. In *Gallo*, we were presented with a similar objection to the use of assessments to fund promotional activities that were not generic, but rather branded, and thus promoted certain brands

to the exclusion of others. Following *Wileman*, we rejected the objection as irrelevant to the constitutionality of the advertising program, stating that "[t]his claim, 'while perhaps calling into question the administration of portions of the program, [has] no bearing on the validity of the entire program.' " *Gallo*, __ F.3d at __ (quoting *Wileman*, 521 U.S. at 468).

Similarly here, Cal-Almond's objections have no bearing on the constitutionality of the creditable and credit-back programs, but rather, call into question the administration of those programs. Because those programs do not compel speech or the endorsement of non-germane messages, leaving Cal-Almond free to advertise however it desires, the Almond Order is "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." *Wileman*, 521 U.S. at 477.

III

Lastly, Cal-Almond asserts that *Cal-Almond I* is dispositive. However, in light of the Supreme Court's remand in *Cal-Almond II* and our subsequent remand for dismissal in *Cal-Almond III*, *Cal-Almond I* has been implicitly overruled.

IV

For the foregoing reasons, the Almond Order does not abridge Cal-Almond's First Amendment rights.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA GRANTING DEFENDANT'S MOTION TO DISMISS DATED AND FILED AUGUST 13, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-F-98-5049 REC SMS

CAL-ALMOND, INC., et al.,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

I. *Introduction*

On January 13, 1998, Plaintiff Cal-Almond, Inc. ("Cal-Almond") and eleven other almond handlers (collectively, "Plaintiffs") filed a complaint against the United States Department of Agriculture ("USDA" or "Defendant") seeking, inter alia, a declaration that the Almond Marketing Order ("AMO"), 7 C.F.R. Part 981, violates Plaintiffs' First Amendment rights under the United States Constitution. On May 4, 1998, this court heard Defendant USDA's motion to

dismiss the complaint on the grounds that the recent Supreme Court decision in *Glickman v. Wileman Bros. & Elliot, Inc.*, __ U.S. __, 117 S. Ct. 2130 (1997), which held a similar marketing order program not to violate the First Amendment, controls the outcome of this case. For the following reasons, this court grants the USDA's motion, and denies Plaintiffs leave to amend.

II. *Background*

A. *The Almond Marketing Order*

The Almond Marketing Order, 7 U.S.C. Part 981, was promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act ("AAMA"), 7 U.S.C. §§ 601, *et seq.*, with the goal of stabilizing the almond industry. *See* Defendant's Opening Brief at 2. The Almond Order is administered by an Almond Board, consisting of ten members, who are nominated by almond growers and handlers and appointed by the Secretary of Agriculture. *See* 7 C.F.R. §§ 981.41; 981.441.

All handlers of almonds, who are regulated under the Order, are liable for assessments to finance the administrative expenses of the Board, and to cover the cost of research, generic advertising, and promotion. The assessment rate, which can vary annually, is currently set at 2 cents per pound of assessable almonds. *See* 7 C.F.R. § 981.343, 62 Fed. Reg. 43459.

Plaintiffs challenge that part of the AMO that imposes assessments for the funding of almond advertising and

promotion. The promotion program is as follows. A portion of the assessment per pound of almonds went to the Almond Board, who then used it to fund generic promotion and advertisement of California almonds. However, at all relevant times, Plaintiffs could obtain credit against that portion of the assessment that went to fund generic advertising by spending money to promote their own brand of almonds in certain, specified ways. This program of advertising-promotion credits took two forms: (1) the "creditable" program, in place from 1986 – 1993; and (2) the "credit-back" program, in place from 1993 to the present.[1] The regulation governing the "creditable" program is 7 C.F.R. § 981.441 (1990). The regulation governing the "credit-back" program is 7 C.F.R. § 981.441 (1996). The court now turns to a discussion of these programs.

1. *The "Creditable" Program*

Under the "creditable" program, almond handlers could obtain 100% credit against the generic-advertising assessment. However, certain kinds of advertising were not eligible for the credit. For example, under the "creditable" program, no credit was available for money spent to advertise products containing almonds, unless the product contained at least 50% raw shelled almonds by weight, and unless the almond product displayed the handler's own brand. The program also gave no credit for money spent on advertising when more than two complimentary branded products were included in an advertisement, nor when the advertisement promoted not only California almonds, but also non-

1. Plaintiffs do not challenge assessments imposed after 1995.

complementary commodities or products, or competing nuts. Finally, no credit was available for money spent promoting retail outlets.

2. *The "Credit-Back" Program*

The "credit-back" program simultaneously expanded the ways in which almond handlers could receive credit for promoting their own brands and reduced the amount of credit it was possible to receive.

Generally, the "credit-back" program reduced the 100% credit to 2/3rds credit. The handlers therefore had to spend $150,000 to earn the $100,000 credit. The "credit-back" program removed the restrictions on credit for promoting almond-containing products, but limited the credit obtainable by the general 2/3rds, as well as by a function of the percentage of almonds in the product. For example, if a handler spent $150,000 to promote a product containing 20% almonds, the amount of the credit would be as follows: $150,000 reduced by 2/3rds = $100,000 x 20% = $20,000.

Although the "credit-back" program expanded the promotions that could receive credit, restrictions remained. For example, a handler could not obtain credit for advertising in a publication that targeting the farming or the grower trade. Also, there was no credit available for billboard advertisements, unless the advertisement directed consumers to a handler-operated outlet offering direct purchase of almonds. Finally, travel expenses were not creditable even if the travel involved meeting with a buyer to convince him to purchase almonds.

In addition to these specific restrictions, the program provided generally that a handler could not receive credit unless it was "appropriate when compared to accepted professional practices and rates for the type of activity conducted." 7 C.F.R. § 981.441(e)(1) (1996). "The clear and evident purpose of each activity [had to] be to promote the sale, consumption, or use of California almonds, and nothing . . . [could] detract from this purpose." *Id.* at (e)(2). Whether a particular promotion could be eligible for credit was decided initially by the Almond Board Staff. *See id.* at (e)(6). That initial decision could be appealed to the public relations and advertising committee of the Board, and then to the Secretary of Agriculture. *See id.*

B. *Plaintiffs' Claim For Relief*

Plaintiffs allege that the assessment program violates their First Amendment rights for three reasons. First, they allege that the restrictions on Plaintiffs' advertising and promotion violated Plaintiffs' rights to freedom of speech and association. Second, they allege that Board approval of advertising constituted a prior restraint on speech. Third, both the "creditable" and the "credit-back" advertising programs placed unconstitutional conditions on a government benefit.

Plaintiffs' primary concern with both the "creditable" and the "credit-back" programs is that the types of advertising on which credit was allowed were essentially useless to them, because Plaintiffs sell mostly processed almonds to be used as ingredients in other products. The only handlers who can make good use of the credits are sellers of packaged snack almonds, such as Blue Diamond. Forcing them to contribute

to the generic advertising fund, Plaintiffs allege, had two effects: (1) it reduced the overall assessments on handlers who sell mostly packaged snack almonds, such as Blue Diamond; and (2) it forced handlers who sell mostly ingredient almonds, such as Plaintiffs, to match the snack-almond producers' advertising budget. According to Plaintiffs, the powerful Blue Diamond company influenced the "creditable" and the "credit-back" advertising programs to serve exactly this purpose. Moreover, Plaintiffs are not the only ones that advance this theory. Both the Administrative Law Judge below and the Ninth Circuit found that the advertising programs at issue were designed to benefit Blue Diamond. *See* ALJ Opinion at 10-11, attached as exhibit to Plaintiffs' complaint; *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 14 F.3d 429, 438-440 (9th Cir. 1994).

C. *Cal-Almond I*

The present matter does not represent the first time this court has heard a First Amendment challenge to this AMO. On February 20, 1991, a number of different almond handlers — plus some of the same handlers involved in this case, as will be discussed more fully below — filed a complaint that attacked the AMO on a number of grounds, including that it violated the First Amendment. The ALJ and the Judicial Officer for the Secretary of Agriculture both ruled that the AMO did not violate the First Amendment. This court affirmed that ruling based on the following reasoning:

> The court concludes that the creditable advertising assessments do not implicate First Amendment rights because plaintiffs are not 'compelled' to

advertise. Section 608c(6)(I) authorizes marketing orders to provide for 'production research [and] marketing research and development projects,' including 'projects . . . provid[ing] for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . .' The Almond Marketing Order contains regulations, duly promulgated through formal on-the-record rulemaking, which authorize the Almond Board to establish market development projects including paid advertising, 7 C.F.R. § 981.14, to credit a portion of a handler's direct expenditures for market promotion, including paid advertising, for the sale of almonds, and to prescribe appropriate rules and regulations as are necessary to effectively regulate the crediting of the pro rata expense assessment of handlers, 7 C.F.R. § 981.41(c). The regulations do not permit plaintiffs to receive a credit against their annual assessment unless their advertising complies with the regulations regarding creditable advertising, but do not compel plaintiffs to participate in advertising because plaintiffs are otherwise free to engage in any advertising they wish without interference with the Almond Board. As the Department argues, however, the Board is not obligated to subsidize any and all advertising that plaintiffs choose to engage in.

Appendix B

Cal-Almond, Inc. v. U.S. Dept. of Agriculture, No. CV-F-91-122 REC, slip op. at 7 (E.D. Cal. June 3, 1992) (order affirming the decision of the Secretary of Agriculture).

The Ninth Circuit reversed this court's decision in a published opinion. *See Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 14 F.3d 429 (9th Cir. 1993). The Ninth Circuit first found that the AMO regulations implicated the plaintiffs' First Amendment rights because they "compelled" the plaintiffs to speak, either by forcing them to subsidize generic advertising, or by forcing them to choose creditable advertising. *See id.* at 434-436. After finding that the plaintiffs' First Amendment rights were implicated, the Ninth Circuit subjected the regulations to the test announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). The Ninth Circuit concluded that the AMO regulations failed the *Central Hudson* test because the regulations did not directly advance the USDA's interests in assisting, improving, or promoting the marketing, distribution, and consumption of almonds. *See id.* at 436-439.

On October 6, 1996, the Supreme Court denied certiorari, *see Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 117 S. Ct. 72 (1996), but after the *Wileman* decision, the Court granted certiorari, vacated the judgment of the Ninth Circuit, and instructed the Ninth Circuit to reconsider its decision in light of *Wileman*. This court received what it thought was the official mandate of the Ninth Circuit instructing it to dismiss the First Amendment claim of the *Cal-Almond* plaintiffs. This court did so on September 16, 1997. However, this court reconsidered and vacated that order on October 1, 1997, because pursuant to Federal Rule of Appellate

Procedure 41 and 42, this court did not have jurisdiction in this matter. The Ninth Circuit on March 24, 1998, issued an order granting the plaintiffs' motion for a stay of mandate until June 1, 1998. On July 22, 1998, the mandate from the Ninth Circuit issued, instructing this court to dismiss the First Amendment claims in *Cal-Almond I*. The Ninth Circuit cited *Wileman* in support of its mandate.

Four of the 12 Plaintiffs in this matter, Cal-Almond, Gold Hills Nut Co., Frazier Nut Farms, Inc., and Carlson Farms, are also parties to *Cal-Almond I*. For that reason, these four plaintiffs are not challenging the "creditable" program.

III. *Analysis*

Although the Ninth Circuit did not issue a published opinion with its mandate, this court believes that it is clear that the Ninth Circuit has found that *Wileman* bars a First Amendment challenge to the "creditable" advertising program. Because the "creditable" program is legally indistinguishable from the "credit-back" program, as far as the *Wileman* analysis is concerned, this court concludes that the Ninth Circuit would also find that the *Wileman* case bars the challenges to the "credit-back" program. Accordingly, this court will dismiss the First Amendment challenges to both programs.

IV. *Conclusion*

In accordance with the foregoing, IT IS ORDERED that Plaintiffs' complaint is DISMISSED. Leave to amend is DENIED, because in the face of a controlling Supreme Court

decision, amendment would be futile. The Clerk of the Court is directed to enter judgment in favor of Defendant.

Dated: August 13th, 1998

s/ Robert E. Coyle
ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED AND FILED AUGUST 14, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-98-5049 REC/SMS

CAL-ALMOND, INC., et al,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

JUDGMENT IN A CIVIL ACTION

DECISION BY COURT: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that JUDGMENT IS ENTERED in favor of Defendant.

DATED: 8/14/98

JACK L. WAGNER, Clerk

By: s/ [illegible]
Deputy Clerk

APPENDIX D — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE DATED DECEMBER 24, 1997

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

94 AMA Docket No. F&V 981-1

In re:

Cal-Almond, Inc., Gold Hills Nut Company, Inc., and Frazier Nut Farms, Inc.,

Petitioners

AND

94 AMA Docket No. F&V 981-3

In re:

Del Rio Nut Company and Monte Vista Farming Company,

Petitioners

AND

94 AMA Docket No. F&V 981-4

In re:

Bal Nut, Inc., Carlson Farms, Central Valley Grower Packing, Hocker Nut Farm, Jardine Organic Ranch, and Rotteveel Orchards,

Petitioners

Appendix D

AND-

94 AMA Docket No. F&V 981-5

In re:

Treehouse Farms, Inc.,

Petitioners

AND

94 AMA Docket No. F&V 981-7

In re:

Theron Shamgochian, Inc., d/b/a Monte Cristo Packing Company, formerly known as Monte Cristo Packing Company and Theron Shamgochian Ranches, Inc., d/b/a Monte Cristo Packing Company, but known always to the Almond Board for the subject crop years as Monte Cristo Packing Company; Beard's Quality Nut Company, a sole proprietorship; and Amaretto Orchards, a California general partnership,

Petitioners

Decision and Order

Cal-Almond, Inc., Gold Hills Nut Company, Inc., and Frazier Nut Farms, Inc., instituted the proceeding captioned 94 AMA Docket No. F&V 981-1 on January 25, 1994; Del Rio Nut Company and Monte Vista Farming Company

instituted the proceeding captioned 94 AMA Docket No. F&V 981-3 on February 25, 1994; Treehouse Farms, Inc., instituted the proceeding captioned 94 AMA Docket No. F&V 981-5 on May 24, 1994; Bal Nut, Inc., Carlson Farms,[1] Central Valley Grower Packing, Hocker Nut Farm, Jardine Organic Ranch, and Rotteveel Orchards instituted the proceeding captioned 94 AMA Docket No. F&V 981-4 on June 15, 1994; and Theron Shamgochian, Inc., d/b/a Monte Cristo Packing Company, Beard's Quality Nut Company, and Amaretto Orchards, instituted the proceeding captioned 94 AMA Docket No. F&V 981-7 on September 20, 1994.[2]

Each proceeding was instituted by a Petition filed pursuant to section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)) [hereinafter the AMAA]; the marketing order regulating Almonds Grown in California (7 C.F.R. §§ 981.1-.474) [hereinafter the Almond Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71)

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1. On November 8, 1994, Carlson Farms requested to withdraw its petition, and Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] granted Carlson Farms' request (Summary of Telephone Conference, filed November 10, 1994).

2. Unless limited by the context in which it is used, the word "Petitioners" in this Decision and Order refers to: Amaretto Orchards, Bal Nut, Inc., Beard's Quality Nut Company, Cal-Almond, Inc., Central Valley Grower Packing, Del Rio Nut Company, Frazier Nut Farms, Inc., Gold Hills Nut Company, Inc., Hocker Nut Farm, Jardine Organic Ranch, Monte Vista Farming Company, Rotteveel Orchards, Theron Shamgochian, Inc., d/b/a Monte Cristo Packing Company, and Treehouse Farms, Inc.

[hereinafter the Rules of Practice]. Each Petition alleges that the advertising program conducted under the Almond Order violates each respective Petitioner's right to freedom of speech guaranteed under the First Amendment of the Constitution of the United States, and each Petition seeks relief from the requirement under the Almond Order that handlers pay assessments for advertising. The First Amendment challenge in each Petition is based, in large part, on *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993).[3]

The Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed an Answer to each Petition: (1) stating that the Petition fails to state a claim upon which relief can be granted and the AMAA and the Almond Order, as interpreted by Respondent and the Almond Board of California, were, and are, in accordance with law; and

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3. On June 27, 1997, the Supreme Court of the United States vacated the judgment of the United States Court of Appeals for the Ninth Circuit in *Cal-Almond Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995), and remanded the case for further consideration in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). On September 4, 1997, the United States Court of Appeals for the Ninth Circuit remanded *Cal-Almond* "to the district court with instruction to dismiss Cal-Almond's First Amendment claim." (Respondent's Memorandum in Support of Motion to the Judicial Office [sic] to Vacate the Findings of Facts, Factual Discussion, Conclusions of Law and Order of the Administrative Law Judge and to Issue an Immediate Decision [hereinafter Respondent's Memorandum in Support of Motion for Immediate Decision], Attachment C.)

(2) requesting that the relief prayed for in the Petition be denied and the Petition be dismissed.[4]

Respondent filed three motions to consolidate the proceedings captioned 94 AMA Docket No. F&V 981-1, 94 AMA Docket No. F&V 981-2,[5] 94 AMA Docket No. F&V 981-3, 94 AMA Docket No. F&V 981-4, and 94 AMA Docket No. F&V 981-5 on the ground that all of the Petitions filed in the proceedings raise similar issues regarding the Almond Order.[6] No Petitioner objected to Respondent's motions to consolidate, and the Chief ALJ granted each of Respondent's motions to consolidate.[7] On September 20,

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4. See: (1) Answer of Respondent, filed in the proceeding captioned 94 AMA Docket No. F&V 981-1 on March 15, 1994; (2) Answer of Respondent, filed in the proceeding captioned 94 AMA Docket No. F&V 981-3 on March 28, 1994; (3) Answer of Respondent, filed in the proceeding captioned 94 AMA Docket No. F&V 981-5 on June 21, 1994; (4) Answer of Respondent, filed in the proceeding captioned 94 AMA Docket No. F&V 981-4 on July 14, 1994; and (5) Answer of Respondent, filed in the proceeding captioned 94 AMA Docket No. F&V 981-7 on October 3, 1994.

5. On November 8, 1994, Dole DF&N, Inc., the only Petitioner in the proceeding captioned 94 AMA Docket No. F&V 981-2, requested to withdraw its Petition, and the Chief ALJ granted Dole DF&N, Inc.'s request (Summary of Telephone Conference, filed November 10, 1994).

6. See Respondent's: (1) Motion to Consolidate Petitions, filed April 18, 1994; (2) Motion to Consolidate Petitions, filed June 24, 1994; and (3) Motion to Consolidate Petitions, filed July 14, 1994.

7. See Chief ALJ's: (1) Order of Consolidation, filed May 4, 1994; (2) Order of Consolidation, filed July 12, 1994; and (3) Order of Consolidation, filed August 26, 1994.

1994, Petitioners in the proceeding captioned 94 AMA Docket No. F&V 981-7 filed a motion requesting consolidation of the proceeding captioned 94 AMA Docket No. F&V 981-7 with the proceeding captioned 94 AMA Docket No. F&V 981-1, 94 AMA Docket No. F&V 981-2,[8] 94 AMA Docket No. F&V 981-3, 94 AMA Docket No. F&V 981-4, and 94 AMA Docket No. F&V 981-5.[9] On September 22, 1994, the Chief ALJ granted the motion for consolidation filed by Petitioners in the proceeding captioned 94 AMA Docket No. F&V 981-7 stating:

> Petitioners in AMA Docket No. F&V 981-7, have requested that their petition be consolidated with the other consolidated petitions in 94 AMA Docket Nos. F&V 981-1, 981-2, 981-3, 981-4 and 981-5.
>
> Respondent and the other petitioners have advised that there is no objection to the request and the petitions in all the referenced cases are hereby consolidated.

Order of Consolidation, filed September 22, 1994.

The Chief ALJ conducted an oral hearing on November 14, 1994, through November 17, 1994, in Fresno, California, and on December 13, 1994, through December 16, 1994, in Los Angeles, California. Mr. Brian C. Leighton, Esq., of the

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8. See note 5.

9. See Petitioners' Request for an Order Consolidation, and Order Thereon, filed September 20, 1994.

Appendix D

Law Offices of Brian C. Leighton, Clovis, California, and James A. Moody, Esq., Washington, D.C., represented Amaretto Orchards, Bal Nut, Inc., Beard's Quality Nut Company, Cal-Almond, Inc., Central Valley Grower Packing, Frazier Nut Farms, Gold Hills Nut Company, Inc., Hocker Nut Farm, Jardine Organic Ranch, Rotteveel Orchards, and Theron Shamgochian, Inc., d/b/a Monte Cristo Packing Company. Mr. Jeffrey A. LeVee, Esq., of Jones, Day, Reavis & Pogue, Los Angeles, California, represented Treehouse Farms, Inc. Mr. Ronald W. Hillberg, Esq., Turlock, California, represented Del Rio Nut Company and Monte Vista Farming Company. Ms. Tejal Mehta, Esq., and Mr. Gregory Cooper, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent. The evidentiary record consists of a 2,560-page transcript and approximately 300 exhibits. Forty-three witnesses testified.

On January 9, 1995, Blue Diamond Growers, Inc. (a non-profit growers' cooperative that markets almonds regulated under the Almond Order), filed a Motion to Intervene, and on January 27, 1995, Paramount Farms, Inc. (a handler of almonds regulated under the Almond Order), filed a Motion to Intervene. On February 21, 1995, pursuant to section 900.57 of the Rules of Practice (7 C.F.R. § 900.57), the Chief ALJ granted the January 9, 1995, and January 27, 1995, motions to intervene permitting Blue Diamond Growers, Inc., and Paramount Farms, Inc. [hereinafter Intervenors], to file a joint brief.[10]

10. See Order Respecting Motions to Intervene by Blue Diamond Growers and Paramount Farms, Inc., filed February 21, 1995.

Appendix D

Petitioners, Intervenors, and Respondent filed post-hearing briefs on March 24, 1995, and reply briefs on May 9, 1995. The Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] on June 15, 1995. The Chief ALJ, relying on *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993),[11] and applying the test in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), for evaluating the constitutionality of commercial speech regulation,[12]

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11. See note 3.

12. The Supreme Court summarized the test for evaluating the constitutionality of commercial speech regulation as follows:

> In commercial speech cases, . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980).

The United States Court of Appeals for the Ninth Circuit, applying the *Central Hudson* test to the almond marketing program, in *Cal-Almond* states:

(Cont'd)

concludes that: (1) Respondent has the burden of proof in these proceedings; (2) Respondent has failed to meet its burden of proving that the Almond Board's advertising and promotional program for crop years 1986-87 through 1994-95 directly advanced the governmental interest of selling more almonds and increasing returns to growers which the United States Department of Agriculture asserted in justification of its regulation of Petitioners' commercial speech; (3) Respondent has failed to meet its burden of proving that the Almond Board's advertising and promotional program for crop years 1986-87 through 1994-95 was no more extensive than necessary to serve the governmental interest of selling more almonds and increasing returns to growers which the United States Department of Agriculture asserted in justification of its regulation of Petitioners' commercial speech; and (4) the Almond Board's advertising and promotional program for crop years 1986-87 through 1994-95 was not in accordance with law because the program violates Petitioners' right to freedom of speech

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(Cont'd)

> Once again, for the almond marketing program to be constitutional, (a) the asserted government interest behind it must be "substantial," (b) the program must "directly advance" that interest, and (c) the program must not be more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351. USDA has the burden of justifying the program by presenting evidence sufficient to satisfy these requirements. *Edenfield v. Fane*, [507] U.S. [761], [769], 113 S. Ct. 1792, 1800, 123 L.Ed. 2d 543 (1993).

Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429, 437 (9th Cir. 1993).

guaranteed by the First Amendment (Initial Decision and Order at 69).

On July 19, 1995, Petitioners appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[13] On August 4, 1995, Respondent filed Respondent's Appeal to the Judicial Officer [hereinafter Respondent's Appeal Petition]. On August 10, 1995, Respondent filed Respondent's Response to Petitioners' Appeal to the Judicial Officer [hereinafter Respondent's Response]; on September 20, 1995, Petitioners filed Petitioners' Joint Response to Respondent's Appeal to the Judicial Officer; and on September 21, 1995, Petitioners filed Petitioners' Response to "Respondent's Proposed Findings of Fact and Conclusions of Law; Appeal of the ALJ's Findings of Fact and Conclusions of Law."

On September 22, 1995, the case was referred to the Judicial Officer for decision, and on May 15, 1996, I issued an Order to Show Cause stating:

> An examination of the Chief ALJ's Decision and Order and the appellate pleadings filed in the consolidated proceeding, *sub judice*, reveals that

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13. The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

any decision by the Judicial Officer herein would have to be based upon the same First Amendment/ commercial free speech issues that are still being litigated in the consolidated *Wileman* [footnote omitted] and consolidated *Cal-Almond* [footnote omitted] proceedings.

On January 24, 1996, the Solicitor General of the United States, on behalf of the Secretary of Agriculture, filed [a] Petition for a Writ of Certiorari in the Supreme Court of the United States seeking review of the United States Court of Appeals for the Ninth Circuit's judgment in *Wileman*. Moreover, I have been informed that the Department will likely request that the Solicitor General file a petition for a writ of certiorari regarding *Cal-Almond*. Consequently, I am issuing this Order for the parties in the proceeding, *sub judice*, to show cause why I should not forestall my Decision and Order herein, and await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond*.

Therefore, the parties herein shall, within 30 days from the service of this Order to Show Cause, file with the Hearing Clerk any cause showing why I should not await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond* before issuing a Decision and Order in the instant case.

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On June 12, 1996, Blue Diamond Growers, Inc., filed Response to Order to Show Cause stating that "[w]aiting until the Supreme Court hands down its decision in [*Wileman* and *Cal-Almond*] provides for the most efficient use of judicial resources." On June 14, 1996, Mr. Brian Leighton, on behalf of Petitioners in 94 AMA Docket No. F&V 981-1, 94 AMA Docket No. F&V 981-3, 94 AMA Docket No. F&V 981-4, and 94 AMA Docket No. F&V 981-7, filed Petitioners' Response to Judicial Officer's Order to Show Cause stating, *inter alia*, that the Supreme Court of the United States had not granted review in *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993), that "the Judicial Officer could render his decision based on the controlling case, *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993)," and that "the Judicial Officer should not stay the proceedings pending the outcome of the review [of *Wileman* and *Cal-Almond*] before the Supreme Court[.]" On June 14, 1996, Respondent filed Respondent's Response to Show Cause Order stating that Respondent "agrees that the Judicial Officer should await the outcome of the Supreme Court review of *Wileman* before issuing a Decision and Order herein." On October 4, 1996, I issued Ruling on Order to Show Cause stating that "[n]o cause having been shown, I shall await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond* before issuing a Decision and Order in the instant case."

On June 25, 1997, the Supreme Court of the United States issued a decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), holding that the First Amendment rights of persons compelled to fund generic advertising of California nectarines, plums, and peaches, in

accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are issued under the AMAA, are not implicated, much less abridged. On June 27, 1997, the Supreme Court granted a petition for a writ of certiorari in *Cal-Almond*, vacated the Ninth Circuit's judgment, and remanded the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). On September 4, 1997, the United States Court of Appeals for the Ninth Circuit remanded *Cal-Almond* "to the district court with instruction to dismiss Cal-Almond's First Amendment claim." (Respondent's Memorandum in Support of Motion for Immediate Decision, Attachment C.)

On October 30, 1997, Respondent filed Respondent's Motion to the Judicial Officer to Vacate the Findings of Facts, Factual Discussion, Conclusions of Law, and Order of the Administrative Law Judge and to Issue an Immediate Decision [hereinafter Respondent's Motion for Immediate Decision] contending that:

> There is only one issue in this proceeding: whether the almond marketing order and program is unconstitutional under the free speech and free association provisions of the First Amendment. . . . This is one of the older proceedings of this nature currently pending in the Department, and the [R]espondent certainly believes that justice always should be rendered as fast as can reasonable [sic] be done. Furthermore, this is a

case where petitioners are not in full compliance and prompt handling of this matter should aid in resolving this situation.

The record herein, however, presents a technical problem with respect to prompt adjudication. . . . A complete review of this record and a reconsideration of all of these points of contention would be a heavy and time-consuming burden on the Judicial Officer. Furthermore, it appears to be unnecessary since the findings, discussion and conclusions of the law judge are no longer relevant.

Under the Supreme Court reasoning in *Wileman* and *Cal-Almond Inc.*, the First Amendment is not even implicated. Further, even if there were any First Amendment issue, it would only ask whether the promotion and advertising of almonds is germane to the [AMAA] and the [Almond] Order and whether the assessments are used for political or ideological activities. . . .

The Judicial Officer, therefore, should: (1) Vacate the entire Decision and Order of the law judge (including the discussion, findings and conclusions therein); (2) Issue findings of fact that petitioners are handlers, that the record contains more evidence of germaneness than the earlier case, and that the record contains no evidence of political or ideological activities; and (3) Issue a Decision and Order dismissing the petitions on the merits.

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> In the unlikely event some reviewing court should determine more extensive factual findings are necessary, the matter can be remanded to the Judicial Officer with specific directions in accord with 7 U.S.C. [§] 608c(15)(B).

Respondent's Motion for Immediate Decision at 1-3.

On November 26, 1997, Mr. Brian Leighton, on behalf of Petitioners in 94 AMA Docket No. F&V 981-1, 94 AMA Docket No. F&V 981-3, 94 AMA Docket No. F&V 981-4, and 94 AMA Docket No. F&V 981-7 filed Petitioners' Response to "Respondent's Motion to the Judicial Officer to Vacate the Findings of Facts, Factual Discussion, Conclusions of Law and Order of the ALJ and to Issue an Immediate Decision" [hereinafter Petitioners' Response to Respondent's Motion for Immediate Decision].[14] Petitioners contend that Respondent's motion must be denied because there is no authority in the Rules of Practice for Respondent's Motion for Immediate Decision, the Judicial Officer already has pending before him Respondent's appeal, and *Glickman*

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14. Mr. Leighton states that "Petitioners in Docket Nos. F&V 981-3 (In Re Del Rio Nut Company, et al) and 981-5 (In Re Treehouse Farms, Inc.) are joining in this Response, and these responding Petitioners have no objection." (Petitioners' Response to Respondent's Motion for Immediate Decision at 1 n.1.) On December 1, 1997, Del Rio Nut Company and Monte Vista Farming Company filed a letter stating that they "join in the response filed by Mr. Brian Leighton" and Treehouse Farms, Inc., filed a letter stating that "Treehouse hereby joins the opposition of Cal-Almond to Respondent's motion to the judicial officer to vacate the findings of fact, etc."

v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130 (1997), does not control the instant proceeding (Petitioners' Response to Respondent's Motion for Immediate Decision at 1.) Petitioners further state that:

> In what would make a mockery out of the "exhaustion" requirement, the Respondent advises the Judicial Officer that he must or should simply ignore all of the witnesses testimony, the evidentiary record, the ALJ's extensive findings of fact, the ALJ's factual discussion and just simply rule that there is no First Amendment issue — regardless of the facts. . . . That is simply not a remedy [available] to the Respondent nor reasoned decision-making.

Petitioners' Response to Respondent's Motion for Immediate Decision at 8.

As an initial matter, section 900.59(a) of the Rules of Practice (7 C.F.R. § 900.59(a)) does not limit motions that may be filed and requires the Secretary to rule on all motions filed after the record has been transmitted to the Secretary, as follows:

> **§ 900.59 Motions and requests.**
>
> (a) *General.* (1) All motions and requests shall be filed with the hearing clerk, except that those made during the course of an oral hearing may be filed with the judge or may be stated orally and made a part of the transcript.

> (2) The judge is authorized to rule upon all motions and requests filed or made prior to the transmittal by the hearing clerk to the Secretary of the record as provided in this subpart. The Secretary shall rule upon all motions and requests filed after that time.

7 C.F.R. § 900.59(a).

The Rules of Practice place no limit on motions that may be filed in proceedings conducted in accordance with the Rules of Practice, and section 900.59(a) of the Rules of Practice (7 C.F.R. § 900.59(a)) requires the Secretary to rule on *all* motions filed after the record has been transmitted to the Secretary. As commonly used, the word *all* does not permit an exception or exclusion not specified.[15] Moreover,

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15. *See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 610-11 (1944) (stating that *all* means all, not substantially all); *William v. United States*, 289 U.S. 553, 572 (1933) (describing the word *all* as a comprehensive word); *McLean v. United States*, 226 U.S. 374, 383 (1912) (stating that *all* excludes the idea of limitation); *National Steel & Shipbuilding Co. v. United States*, 419 F.2d 863, 875 (Ct. Cl. 1969) (stating that *all* means the whole of that which it defines, not less than its entirety and that the purpose of the word *all* is to underscore that intended breadth is not to be narrowed); *Texaco, Inc. v. Pigott*, 235 F. Supp. 458, 464 (S.D. Miss. 1964) (stating that *all* means *the whole, the sum of all the parts, the aggregate* and that *all* is about the most comprehensive and all inclusive word in the English language), *aff'd per curiam*, 358 F.2d 723 (5th Cir. 1966); *Travelers Ins. Co. v. Cimarron Ins. Co.*, 196 F. Supp. 681, 684 (D. Or. 1961) (stating that the word *all* when referring to the amount, quantity, extent, duration, quality, or degree

(Cont'd)

Appendix D

(Cont'd)
means *the whole of* and that a statute which says *all* excludes nothing); *Fischer & Porter Co. v. Brooks Rotameter Co.*, 86 F. Supp. 502, 503 (E.D. Pa. 1949) (stating that the word *any* implies totality as plainly as does the word *all* and the only difference is that *any* arrives at totality by a series of choices for consideration, whereas *all* arrives at totality in a single leap); *In re Central of Georgia Ry.*, 58 F. Supp. 807, 813 (S.D. Ga. 1945) (stating that a more comprehensive and all-inclusive word than *all* can hardly be found in the English language, there is a totality about the word all that few words possess), *rev'd on other grounds and remanded sub nom. Liberty National Bank & Trust Co. v. Bankers Trust*, 150 F.2d 453 (5th Cir. 1945); *United States v. Bachman*, 246 F. 1009, 1011 (E.D. Pa. 1917) (stating that the word intended to embrace every member of a class, where the number of the members of the class exceeds two, is the word *all*); *Beckwith v. Chicago, M. & St. P. Ry.*, 223 F. 858, 860 (W.D. Wash. 1915) (stating that the word *all* is very comprehensive in its meaning); *The Koenigin Luise*, 184 F. 170, 173 (D.N.J. 1910) (describing the word *all* as an inclusive term); *In re Lindsay Foods, Inc.*, 56 Agric. Dec. ___, slip op. 12-13 (Aug. 28, 1997) (Remand Order) (stating that, as commonly used, the word *all* does not permit an exception or exclusion not specified, and that there is no basis for reading the word *all* as used in 7 C.F.R. § 1.143(b)(2) narrowly); *In re Far West Meats*, 55 Agric. Dec. 1045, 1050 (1996) (Clarification of Ruling on Certified Questions) (stating that, as commonly used, the word *all* does not permit an exception or exclusion not specified, and that there is no basis for reading the word *all* as used in 7 C.F.R. § 1.143(a) narrowly); *In re Far West Meats*, 55 Agric. Dec. 1033, 1037 (1996) (Ruling on Certified Questions) (stating that, as commonly used, the word *all* does not permit an exception or exclusion not specified, and that there is no basis for reading the word *all* as used in 7 C.F.R. § 1.143(a) narrowly); *In re Weissglass Gold Seal Dairy Corp.*, 32 Agric. Dec. 1004, 1041 (1973) (stating that: the word *all* means as much as possible, every individual component, every, and any whatever; the

(Cont'd)

the context in which the word *all* is used in section 900.59(a) of the Rules of Practice (7 C.F.R. § 900.59(a)) provides no basis for reading the word *all* narrowly. Since there is no explicit limitation in the Rules of Practice on the nature of motions that may be filed, and the Secretary must rule on *all* motions filed after the transmittal of the record to the Secretary, I disagree with Petitioners' contention that there is no authority in the Rules of Practice for Respondent's Motion for Immediate Decision, and Respondent's previous filing of an appeal does not affect Respondent's right to file a motion in accordance with section 900.59(a) of the Rules of Practice (7 C.F.R. § 900.59(a)). However, I agree with Petitioners' general contention that I must review the record prior to issuing a Decision and Order. The Administrative Procedure Act provides that an order may not be issued except on consideration of the whole record or those parts of the record cited by a party, as follows:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a

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(Cont'd)

word *all* signifies the whole of; a more comprehensive word than *all* cannot be found in the English language; a more comprehensive and all-inclusive word than *all* can hardly be found in the English language), *aff'd*, 369 F. Supp. 632 (S.D.N.Y. 1973).

> party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556(d).

I reject Respondent's suggestion (Respondent's Motion for Immediate Decision at 3-4) that a Decision and Order could be issued in this proceeding without consideration of at least those portions of the record cited by the parties. Therefore, based solely on my view that I must review the record prior to issuing an order in this proceeding, Respondent's Motion for Immediate Decision is denied.

After reviewing the record in this proceeding, I find that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is dispositive of the First Amendment issue in this proceeding, and the appellate filings reveal that the First Amendment issue, Petitioners' request for a refund of assessments, and Respondent's motion to exclude "the entire testimony of petitioner Monte Cristo" are the only remaining issues in this proceeding. Further, I find that much of the evidence; much of Petitioners', Respondents', and Intervenors' filings; and much of the Chief ALJ's Initial Decision and Order have been rendered irrelevant by *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

Based on my finding that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), has rendered much of the Chief ALJ's Initial Decision and Order irrelevant; my disagreement with the Chief ALJ's conclusion that Respondent has the burden of proof in this proceeding

instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)); my disagreement with the Chief ALJ's conclusion that the Almond Board's advertising and promotional program for crop years 1986-87 through 1994-95 violates the First Amendment of the Constitution of the United States; and my finding that *Wileman Bros.* is dispositive of the First Amendment issue in this proceeding, I have not adopted the Chief ALJ's Initial Decision and Order as the final Decision and Order.

Petitioner Amaretto Orchards' exhibits are designated by the letters "AO"; Petitioner Bal Nut, Inc.'s exhibits are designated by the letters "BN"; Petitioner Beard's Quality Nut Company's exhibits are designated by the letters "BQN"; Petitioner Cal-Almond, Inc.'s exhibits are designated by the letters "CA"; Petitioner Central Valley Grower Packing's exhibits are designated by the letters "CVG"; Petitioner Del Rio Nut Company's exhibits are designated by the letters "DRN"; Petitioner Frazier Nut Farms, Inc.'s exhibits are designated by the letters "FN"; Petitioner Gold Hills Nut Company, Inc.'s exhibits are designated by the letters "GH"; Petitioner Hocker Nut Farm's exhibits are designated by the letters "HNF"; Petitioner Jardine Organic Ranch's exhibits are designated by the letters "JOR"; Petitioner Monte Cristo Packing Company's exhibits are designated by the letters "MC"; Petitioner Monte Vista Farming Company's exhibits are designated by the letters "DRN"; Petitioner Rotteveel Orchards' exhibits are designated by the letters "RO"; Petitioner Treehouse Farms, Inc.'s exhibits are designated by the letters "TREE"; Petitioners' joint exhibits are designated by the letters "PJ"; Respondent's exhibits are designated by the letters "RX"; and transcript references are designated by "Tr."

Appendix D

PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The pertinent provision of the Constitution of the United States provides, as follows:

United States Constitution:

Amendment I

> Congress shall make no law . . . abridging the freedom of speech.

U.S. Const. amend. I.

The pertinent provisions of the AMAA provide, as follows:

7 U.S.C.:

TITLE 7 — AGRICULTURE

. . . .

CHAPTER 26 — AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III —
COMMODITY BENEFITS

. . . .

Appendix D

§ 608c. Orders regulating handling of commodity

. . . .

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

. . . .

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds . . . such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds . . . may provide for crediting the pro rata expense assessment obligations of a handler with all or

any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon

the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. § 608c(6)(I), (15)(A).

The pertinent provisions of the Federal Agriculture Improvement and Reform Act of 1996 provide, as follows:

110 Stat.:

TITLE V — AGRICULTURAL PROMOTION

Subtitle A — Commodity Promotion and Evaluation

SEC. 501. COMMODITY PROMOTION AND EVALUATION.

(a) COMMODITY PROMOTION LAW DEFINED. — In this section, the term "commodity promotion law" means a Federal law that provides for the establishment and operation of a promotion program regarding an agricultural commodity that includes a combination of promotion, research, industry information, or consumer information activities, is funded by mandatory assessments on producers or processors, and is designed to maintain or expand markets and uses for the commodity (as determined by the Secretary). The term includes —

(1) the marketing promotion provisions under section 8c(6)(I) of the Agricultural Adjustment Act (7 U.S.C. 608c(6)(I), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937[.]

. . . .

(b) FINDINGS. — Congress finds the following:

(1) It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.

(2) These generic commodity promotion programs, funded by the agricultural producers or processors who most directly reap the benefits of the programs and supervised by the Secretary of Agriculture, provide a unique opportunity for producers and processors to inform consumers about their products.

(3) The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law,

rather than to maintain or expand the share of those markets held by any individual producer or processor.

(4) The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.

(5) It has never been the intent of Congress for the generic commodity promotion programs established and funded by the commodity promotion laws to replace the individual advertising and promotion efforts of producers or processors.

(6) An individual producer's or processor's own advertising initiatives are typically designed to increase the share of the market held by that producer or processor rather than to increase or expand the overall size of the market.

(7) In contrast, a generic commodity promotion program is intended and designed to maintain or increase the overall demand for the agricultural commodity covered by the program and increase the size of the market for that commodity, often by utilizing promotion methods and techniques that individual producers and

processors typically are unable, or have no incentive, to employ.

(8) The commodity promotion laws establish promotion programs that operate as "self-help" mechanisms for producers and processors to fund generic promotions for covered commodities which, under the required supervision and oversight of the Secretary of Agriculture —

> (A) further specific national governmental goals, as established by Congress; and
>
> (B) produce nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding the markets for the covered commodities.

(9) While some commodity promotion laws grant a producer or processor the option of crediting individual advertising conducted by the producer or processor for all or a portion of the producer's or processor's marketing promotion assessments, all promotion programs established under the commodity promotion laws, both those programs that permit credit for individual advertising and those programs that do not contain such provisions, are very narrowly tailored to fulfill the congressional purposes of the

commodity promotion laws without impairing or infringing the legal or constitutional rights of any individual producer or processor.

Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 501(a)(1), (b)(1)-(9), 110 Stat. 888, 1029-31 (1996).

The pertinent provisions of the Rules of Practice provide, as follows:

7 C.F.R:

TITLE 7 — AGRICULTURE

. . . .

SUBTITLE B — REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER IX — AGRICULTURAL MARKETING SERVICE

PART 900 — GENERAL REGULATIONS

. . . .

SUBPART — RULES OF PRACTICE GOVERNING PROCEEDINGS ON PETITIONS TO MODIFY OR TO BE EXEMPTED FROM MARKETING ORDERS

. . . .

Appendix D

§ 900.51 Definitions.

As used in this subpart, the terms as defined in the act shall apply with equal force and effect. In addition, unless the context otherwise requires:

. . . .

(i) The term *handler* means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable[.]

. . . .

§ 900.52 Institution of proceeding.

(a) *Filing and service of petition.* Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary.

7 C.F.R. §§ 900.51(i), .52(a).

The pertinent provisions of the Almond Order (1994) provide, as follows:

Appendix D

7 C.F.R.:

TITLE 7 — AGRICULTURE

. . . .

SUBTITLE B — REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER IX — AGRICULTURAL MARKETING SERVICE

. . . .

PART 981 — ALMONDS GROWN IN CALIFORNIA

SUBPART — ORDER REGULATING HANDLING

DEFINITIONS

. . . .

§ 981.4 Almonds.

Almonds means (unless otherwise specified) all varieties of almonds (except bitter almonds), either shelled or unshelled, grown in the State of California, and for the purposes of research includes almond shells and hulls.

. . . .

Appendix D

§ 981.12 Grower.

Grower is synonymous with *producer* and means any person engaging, in a proprietary capacity, in the commercial production of almonds.

§ 981.13 Handler.

Handler means any person handling almonds during any crop year, except that such term shall not include either a grower who sells only almonds of his own production at retail at a roadside stand operated by him, or a person receiving almonds from growers and other persons delivering these almonds to a handler.

. . . .

§ 981.19 Crop year.

Crop year means the 12 months from July 1 to the following June 30 inclusive.

. . . .

§ 981.22 Board.

Board means the Almond Board of California which is the administrative agency established by this subpart.

Appendix D

ALMOND BOARD OF CALIFORNIA

. . . .

§ 981.38 Powers.

The Board shall have the following powers:

(a) To administer the provisions of this part in accordance with its terms;

(b) To make rules and regulations to effectuate the terms and provisions of this part;

(c) To receive, investigate and report to the Secretary complaints of violations of this part; and

(d) To recommend to the Secretary amendments to this part.

RESEARCH

§ 981.41 Research and development.

(a) *General.* The Board, with the approval of the Secretary, may establish or provide for the establishment of projects involving production research, marketing research and development projects, and marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of almonds. The Board

may also provide for crediting the pro rata expense assessment obligations of a handler with such portion of his direct expenditure for such marketing promotion including paid advertising as may be authorized. The expenses of such projects shall be paid from funds collected pursuant to § 981.81(a) or credited pursuant to paragraph (c) of this section.

(b) *Authorization.* If, on the basis of a Control Board recommendation pursuant to § 981.40(e) with respect to projects pursuant to this section, and appertaining rules and regulations established by the Secretary on recommendation of the Board, and other available information, the Secretary concurs that such activities should be permitted, he shall authorize such activities.

(c) *Creditable expenditures.* The Board, with the approval of the Secretary, may provide for crediting all or any portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products or their uses. No handler shall receive credit for any allowable direct expenditures that would exceed the total of his assessment obligation which is attributable to that portion of his assessment designated for marketing promotion including paid advertising. Such expenditures may include, but are not limited to, money spent for advertising space or

time in newspaper, magazines, radio, television, transit, and outdoor media, including the actual standard agency commission costs not to exceed 15 percent: *Provided*, That, with respect to paid advertising, advertising production costs, preparation expenses, travel allowances, and other expenses not directly connected with paid space or time, and costs relating to pre-testing of advertising, test marketing, directory advertising, point of sales materials, premiums, and trade promotion allowances shall not be eligible for credit against a handler's assessment obligation.

(d) *Promotion guidelines.* All marketing promotion activity engaged in by the Board, including paid advertising, shall be subject to the following terms and conditions:

(1) No marketing promotion, including paid advertising shall refer to any private brand, private trademark or private trade name;

(2) No promotion or advertising shall disparage the quality, use, value, or sale of like or any other agricultural commodity or product, and no false or unwarranted claims shall be made in connection with the product;

(3) No promotion or advertising shall be undertaken without reason to believe that returns to producers will be improved by such activity; and

(4) Upon conclusion of each activity, but at least annually, the Board shall summarize and report the results of such activity to its members and to the Secretary.

(e) *Rules and regulations.* Before any project involving marketing promotion, including paid advertising and the crediting of the pro rata expense assessment obligation of handlers is undertaken pursuant to this section, the Secretary, after recommendation by the Board, shall prescribe appropriate rules and regulations as are necessary to effectively regulate such activity.

SUBPART — ADMINISTRATIVE RULES AND REGULATIONS

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§ 981.441 Credit for market promotion activities, including paid advertising.

(a) In order for a handler to receive credit for his/her own promotional activities from his/her pro rata portion of advertising assessment payments, pursuant to § 981.41(c), the Board must determine that such expenditures meet the applicable requirements of this section. Credit will be granted in the form of a payment from the Board, hereinafter termed "Credit-Back." Credit-Back will be granted in an amount not to exceed 50 percent of a handler's proven expenditures for qualified activities.

(b) The portion of the handler assessment for which credit may be received under this section will be billed, and is due and payable, at the same time as the portion of the handler assessment used for the Board's administrative expenses.

(c) The Board shall grant Credit-Back for qualifying activities only to the handler who performed such activities and who filed a claim for Credit-Back in accordance with this section.

(d) Credit-Back shall be granted only for qualified promotional activities which are conducted and completed during the crop year for which Credit-Back is requested.

(e) The following requirements shall apply to Credit-Back for all promotional activities:

(1) Credit-Back granted by the Board shall be that which is appropriate when compared to accepted professional practices and rates for the type of activity conducted. In the case of claims for Credit-Back activities not covered by specific and established criteria, the Board shall grant the claim if it is consistent with practices and rates for similar activities. To this end, the Board may issue guidelines for qualifying activities from time to time as warranted. For activities in markets other than the United States and Canada, paragraph (e)(5) of this section shall also apply.

(2) The clear and evident purpose of each activity shall be to promote the sale, consumption or use of California almonds, and nothing therein shall detract from this purpose.

(3) No Credit-Back will be given for advertising placed in publications that target the farming or grower trade. No Credit-Back shall be given for any outdoor advertising or sponsorships in the California almond growing counties of Butte, Colusa, Fresno, Glenn, Kern, Madera, Merced, Sacramento, San Joaquin, Stanislaus and Tulare counties, except that, outdoor advertising in these counties which specifically directs consumers to a handler-operated outlet offering direct purchase of almonds will be eligible for Credit-Back.

(4) Credit-Back shall be granted for those qualified activities specified below, except that Credit-Back for travel expenses will not be allowed in any case.

(i) *Paid advertising directed to end users, trade or industrial users.* Credit-Back shall be granted for money spent on paid advertising space or time including, but not limited to, newspapers, magazines, radio, television, transit and outdoor media, and including the standard agency commission costs not to exceed 15 percent of gross.

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(ii) *Other market promotion activities.* Credit-Back shall be granted for market promotion other than paid advertising, for the following activities:

(A) Marketing research (except pre-testing and test-marketing of paid advertising);

(B) Trade and consumer product publicity;

(C) Printing costs for promotional material;

(D) Direct mail printing and distribution;

(E) Retail in-store demonstrations;

(F) Point-of-sale materials (not including packaging);

(G) Sales and marketing presentation kits;

(H) Trade fairs and exhibits;

(I) Trade seminars;

(J) 50/50 advertising with retailers;

(K) Couponing (printing, distribution and handling costs only);

(L) Purchase of Board produced promotional materials; and

(M) Sponsorships.

(iii) For any qualified activity involving joint participation by a handler and a manufacturer or seller of a complementary product(s), or a handler selling multiple complementary products, including other nuts, with such activity including the handler's name or brand, or the words "California Almonds", the amount allowed for Credit-Back claim shall reflect that portion of the activity represented by almonds, or the handler's actual payment, whichever is less.

(iv) When products containing almonds are promoted, the amount allowed for Credit-Back claim shall reflect that portion of the product weight represented by almonds, or the handler's actual payment, whichever is less. In addition, the product must display the handler's name or brand, or the words "California Almonds" on the primary, face label.

(5) Credit-Back for promotional activities in a foreign market shall be granted at 50 percent of a handler's unreimbursed expenditures for qualified activities in any foreign market, if the handler is promoting pursuant to a contract with the Foreign Agricultural Service, USDA (FAS) and/or the California Department of Food and Agriculture (CDFA). Such activities must also meet the requirements of paragraphs (e)(1), (2), (3), (4) and (6) of this section. Unless the Board is administering the foreign marketing program, such activities shall not be eligible for

Credit-Back unless the handler certifies that he/she was not and will not be reimbursed by either FAS or the CDFA for the amount claimed for Credit-Back, and has on record with the Board all claims for reimbursement made to FAS and/or the CDFA. Foreign market expenses paid by third parties as part of a handler's contract with FAS or CDFA will not be eligible for Credit-Back.

(6) A handler must file claims with the Board to obtain Credit-Back for promotional expenditures, as follows:

(i) Within 15 days after start of the applicable crop year, a handler must declare to the Board his/her intention to apply for Credit-Back funds, and for what amount of his/her assessment funds he/she intends to seek Credit-Back: Provided, That, with respect to the 1993-94 crop year, handlers must declare their intent no later than October 15, 1993. If a handler's intent is not declared on or before that time, there will be no further consideration of Credit-Back claims from that handler for that entire crop year.

(ii) If a handler has declared his/her intention to apply for Credit-Back funds, but does not submit any approved activity claims by January 15 of the crop year, he/she will be ineligible to apply for any Credit-Back funds for that entire crop year.

(iii) After a handler has declared to the Board his/her intention to apply for Credit-Back funds, he/she must get pre-approval from the Board in writing for each activity he/she plans to conduct. Once pre-approval is received, the handler can then conduct the activity and, upon completion, submit a claim to the Board.

(iv) All claims submitted to the Board for any qualified activity must include:

(A) Reference to the pre-approval number for the activity assigned by the Board;

(B) A description of the activity and when and where it was conducted;

(C) Copies of all invoices from suppliers or agencies;

(D) Copies of all canceled checks issued by the handler in payment of these invoices; and

(E) An actual sample, picture or other physical evidence of the activity.

(v) Checks from the Board in payment of approved Credit-Back claims will be mailed to handlers on February 15, April 15, June 15, and 30 days after submission of final claims for the crop year pursuant to paragraph (c)(6)(vi) of this section. To receive payment on these dates,

handler claims must be submitted, with all required elements, at least one month prior to the payment date. A handler can receive Credit-Back for his/her allowable direct expenditures only up to the amount of that portion of the handler's assessment designated for marketing promotion, including paid advertising.

(vi) A statement of the Credit-Back commitments outstanding as of the close of a crop year must be submitted in full to the Board within 15 days after close of that crop year. Final claims must be submitted within 105 days after the close of that crop year.

(f) *Appeals.* If a determination is made by the Board staff that a particular promotional activity is not eligible for Credit-Back because it does not meet the criteria specified herein, or for any other reason, the affected handler may request the Public Relations and Advertising Committee to review the Board staff's decision. If the affected handler disagrees with the decision of the Public Relations and Advertising Committee, the handler may request that the Board review the Committee decision. If the handler disagrees with the decision of the Board, the handler, through the Board, may request that the Secretary review the Board's decision. The Secretary maintains the right to review any decisions made by the aforementioned bodies at his/her discretion.

7 C.F.R. §§ 981.4, .12, .13, .19, .22, .38, .41, .441 (1994).

Appendix D

The pertinent provision of the Almond Order (1993) provides, as follows:

7 C.F.R.:

TITLE 7 — AGRICULTURE

. . . .

SUBTITLE B — REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER IX — AGRICULTURAL MARKETING SERVICE

. . . .

PART 981 — ALMONDS GROWN IN CALIFORNIA

. . . .

SUBPART — ADMINISTRATIVE RULES AND REGULATIONS

. . . .

Appendix D

§ 981.441 Crediting for marketing promotion including paid advertising.

(a) In order for a handler to receive credit for his marketing promotion expenditures, including paid advertising, against his pro rata expense assessment obligation pursuant to § 981.41(c), the Board shall determine that such expenditures meet the applicable requirements of this section.

(b) Each paid advertisement must be published, broadcast, or displayed and other marketing promotion activities must be conducted during the crop year for which credit is requested, except that a handler may receive credit up to a maximum of 40 percent of his total creditable advertising and promotion obligation as of the June 30 redetermination report for expenditures made for advertisements published, broadcast, or displayed and other marketing promotion activities conducted no later than December 31 of the subsequent crop year. A handler utilizing this extension shall: (1) File any required documentation with the Board no later than the following January 31, and (2) certify to the Board, at the time of the June 30 redetermination, his planned expenditures during the extension period.

(c) The following requirements shall apply to crediting for paid advertising:

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(1) Credit granted by the Board for paid advertising shall be that which is appropriate when compared to the applicable outlet rate published in the domestic or Canadian catalogs of Standard Rate and Data Service or station, publisher, or outdoor rate cards. In the case of claims for credit not covered by any such source, the Board shall grant the claim if it is consistent with rates for comparable outlets. For advertisements in markets other than the United States and Canada, paragraph (c)(4) of this section shall apply.

(2) The clear and evident purpose of each advertisement shall be to promote the sale, consumption, or use of California almonds, and nothing therein shall detract from this purpose.

(3) Credit for paid advertising shall be granted:

(i) For 100 percent of a handler's payment to an advertising medium:

(A) For a generic advertisement of California almonds;

(B) For an advertisement of the handler's brand of almonds;

(C) When either of these advertisements includes reference to a complementary commodity or product;

(D) For a trade media advertisement that displays branded food products containing almonds, or announces a handler's future promotion activities, including joint promotions, and the entire expenditure is borne by the handler;

(E) For in-store supermarket advertisements using fixed position, video media, or light emitting diode (LED) signs, when such payments are made through an advertising firm or company which specializes in the production of LED advertisements and the placement of those advertisements: (*1*) Fixed position advertisements must include one or more of the following: (*i*) Processed color displays enclosed in plastic frames and mounted on supermarket shopping carts; (*ii*) overhead directories enclosed in frames placed at the end or middle of supermarket aisles; or (*iii*) processed color advertisements enclosed in frames and mounted on a supermarket shelf; (*2*) Video advertisements must be shown on a fixed video monitor running television commercials or infomercials for specific products on a rotating basis; (*3*) LED advertisements must be shown on an in-aisle LED screen running specific product messages on a rotating basis; or

(F) For processed color displays enclosed in frames mounted on fixtures outside and in front of retail food stores when payments are made through an advertising firm.

(ii) For an advertisement resulting from joint participation by a handler and a manufacturer or seller of a complementary commodity or product, and including the brands of both, the credit shall be 50 percent of the total allowable payment to the advertising medium, or the handler's payment thereof, whichever is less.

(iii) For an advertisement resulting from joint participation by a handler and manufacturers or sellers of two complementary commodities or products, and including the brands of all three, the credit shall be one-third of the total allowable payment to the advertising medium, or the handler's payment thereof, whichever is less.

(iv) When almond products, other than almond butter, are advertised, the credit shall be 50 percent of the total allowable payment to the advertising medium or 50 percent of the handler's payment thereof, whichever is less: *Provided*, That (A) the almond product does not contain nuts other than almonds, (B) the almond product contains at least 50 percent raw shelled almonds by weight, and (C) the almond product displays the handler's brand and: *Provided further*, That, if the product is advertised with forms of almonds for which 100 percent credit is allowed, the advertisement shall receive 100 percent credit provided it meets the criteria of paragraph (c)(3)(iv)(A), (B), and (C) of this section. With respect to almond butter advertising, the credit

shall be 100 percent of the total allowable payment to the advertising medium or 100 percent of the handler's payment thereof, whichever is less. For the handler to receive credit, the almond butter must meet the specifications contained in § 981.466, and the handler's brand must be displayed.

(4) Credit for media expenditures in a foreign market shall be granted:

(i) For handlers' unreimbursed media expenditures for advertising in any foreign market pursuant to a contract with the Foreign Agricultural Service, U.S. Department of Agriculture, and/or the California Department of Food and Agriculture, provided the advertisements meet the requirements of paragraphs (c)(2) and (3) of this section and the limitations of paragraphs (c)(5)(i) and (ii) of this section. Such advertising in foreign markets shall not be creditable unless the handler certifies on ABC Form 31 that said handler was not and will not be reimbursed for such advertising by the Foreign Agricultural Service or the California Department of Food and Agriculture and submits to the Board copies of all claims for reimbursement filed with the Foreign Agriculture Service and/or the California Department of Food and Agriculture.

(ii) For a handler's media expenditures for brand advertising in any country where California

almonds are sold, credit shall be allowed when claims are substantiated by applicable rate cards. The provisions of this section applicable to domestic advertising shall also apply to the crediting of advertising in these markets.

(5) Credit granted a handler shall be subject to other conditions as follows:

(i) No credit shall be granted to a handler when more than two complementary branded products are included in an advertisement.

(ii) Advertisements which, in addition to promoting California almonds, also mention or promote the sale of noncomplementary commodities or products, or of competing nuts, shall not be eligible for credit.

(iii) Advertisements which direct consumers to one or more named retail outlets, other than handler operated, shall not be eligible for credit.

(6) A handler must file a claim with the Board to obtain credit for an advertising expenditure. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit),

stating that documentation will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proof of performance as follows:

(i) For published advertisements, submit a copy of the publication invoice, agency invoice, if any, and tear sheet of the advertisement.

(ii) For radio advertisements, submit a copy of the station invoice, a copy of the script, or reference to a copy on file with the Board, and the agency invoice, if any.

(iii) For television advertisements, submit a copy of the station invoice, a copy of the script and tape or story board of the advertisement, or a reference to these in the Board files, and the agency invoice, if any.

(iv) For outdoor advertisements, submit a copy of the company invoice, a photograph of the display or a reference to a photograph in the Board files, and the agency invoice, if any.

(v) For in-store supermarket advertising and for mounted advertising enclosed in frames outside and in front of retail food stores, submit a

copy of the company invoice, a copy of the actual advertisement or video tape, a published rate card from a nationally recognized company, and a copy of the agency invoice, if any.

(vi) Each claim shall also include a certification to the Secretary of Agriculture and to the Board that the claim is just and conforms to requirements set forth in § 981.41(c). The Board shall advise the handler promptly of the extent to which such claim has been allowed.

(d) The following requirements shall apply to crediting for marketing promotion other than paid advertising:

(1) Credit for marketing promotion expenditures shall be granted:

(i) For the distribution of sample packages containing one-half ounce or less of almonds to charitable or educational outlets. For the purposes of this section, the term *charitable outlet* means an organization to which a charitable contribution as defined in section 170(c) of the Internal Revenue Code (26 U.S.C. 170(c)) may be made. Such sample packages shall be packed for the Board under its generic label and sold to the distributing handlers at the price paid for them by the Board. Credit shall be based on the price a handler pays the Board for such packages and upon receipt by the Board of acceptable proof of

distribution. Such sample packages may or may not be personalized with an individual handler's label. Credit applicable to the distribution of sample packages shall be subject to the following conditions:

(A) A handler may receive credit for 150 percent of the purchase price of such packages against the creditable assessment obligation incurred on the first 4,000,000 redetermined kernel weight pounds received by him during a crop year.

(B) A handler may receive credit for 100 percent of the purchase price of such packages against the creditable assessment obligation incurred on the second 4,000,000 redetermined kernel weight pounds received by him during a crop year.

(C) No credit shall be granted in excess of the creditable assessment obligation incurred on 8,000,000 redetermined kernel weight pounds received by a handler during a crop year.

(D) No credit shall be granted for sample packages distributed to market segments where almonds are already being sold. Handlers shall obtain approval from the Board prior to distribution to ensure that this condition is met.

(E) No credit shall be applicable to the distribution of sample packages in outlets where they will be used for resale.

(F) Handlers must place written orders for sample packages with the Board no later than February 1 of any crop year except to the extent that handlers use the deferment provision found in paragraph (b) of this section: *Provided*, That for the 1988-89 crop year, handlers must place written orders no later than March 15, 1989. Handlers must place written orders for sample packages with the Board no later than August 15 of any crop year to receive credit for up to 40 percent of their creditable assessment obligations when using the deferment provision pursuant to paragraph (b) of this section.

(G) Handlers must file claims with the Board in order to receive credit for the distribution of sample packages. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that proof of distribution will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final

claim must be submitted on ABC Form 31 and accompanied by appropriate proof of performance. This proof shall consist of a signed statement from the organization to which sample packages were distributed, on that organization's letterhead, stating:

(1) The name and address of the handler from whom the packages were received;

(2) The date of receipt;

(3) The volume of packages received;

(4) How such packages will be used; and

(5) A statement that such packages will not be used for resale.

(ii) For promotion materials available from the Board and sold to handlers at the price paid for them by the Board. Credit shall be granted for the amount a handler pays the Board for such materials upon purchase. Such materials may or may not be personalized with the label of an individual handler.

(iii) For costs directly related to mail order promotion subject to the following conditions:

(A) Credit shall only be granted for the following expenditures:

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(*1*) For the purchase of mailing lists to conduct mail order promotions.

(*2*) For the cost of envelopes and postage to mail promotional materials.

(B) Credit for mail order promotion shall be limited to a total of $25,000 or 25 percent of a handler's creditable assessment per crop year, whichever is greater.

(C) Handlers must file claims with the Board in order to receive credit for mail order promotion expenditures. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that proof of performance will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proofs of performance such as invoices or postal receipts.

(e) Credit shall be granted for payments made to the Board for use by the Board for generic marketing promotion including paid advertising subject to the following conditions:

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(1) A handler may receive credit for 150 percent of a payment made to the Board against the creditable assessment obligation.

(2) When a handler elects to use this method of crediting for all or a portion of such handler's assessment obligation, the handler may use the extension provided for pursuant to paragraph (b) of this section for the handler's deferred advertising and promotion obligation.

(3) Handlers must file claims with the Board on ABC Form 31 in order to receive credit for payments made to the Board. No credit shall be granted unless a claim is filed on or before January 31 of the then current crop year: *Provided*, That for the 1988-89 crop year for claims not previously filed on or before January 31, 1989, a claim or supplementary claim must be filed with the Board on ABC Form 31 on or before March 31, 1989. Payments must be made as follows: One-fourth of total claim on or before January 31; one-fourth on or before March 31; one-fourth on or before May 31; and one-fourth on or before June 30 of the then current crop year: *Provided*, That for the 1988-89 crop year, payments not previously made on or before January 31, 1989, must be made as follows: One-third on or before March 31, 1989; one-third on or before May 31, 1989; and one-third on or before June 30, 1989. If the entire amount of the claim is not paid by June 30, or if a handler fails to meet any payment

deadline of this paragraph, credit for payment shall revert to the 100 percent basis.

7 C.F.R. § 981.441 (1993).

I. Findings of Fact

A. The Almond Order and Its Promotion Program

1. The AMAA authorizes the creation of marketing orders to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce. The Secretary promulgated the Almond Order in 1950, pursuant to the AMAA. (15 Fed. Reg. 4272; 15 Fed. Reg. 3623 (1950).)

2. Evidence indicated that if current almond production levels continued, there would be a significant decrease in the price of almonds and high levels of production were predicted to continue. The Almond Order was promulgated to stabilize the almond industry. The goal of the Almond Order is to provide an adjustment of the supply of almonds to the trade demand, and as a result, increase grower returns. (15 Fed. Reg. 3623-24 (1950).)

3. The Almond Order contains provisions for advertising and promotion by the Almond Board which administers the Almond Order and the regulations which implement the advertising and promotion program. (7 C.F.R. §§ 981.41, .441 (1994).) The Almond Board gives credit against "advertising assessments" to those handlers who engage in specified forms of branded advertising and brand

promotion. (7 C.F.R. §§ 981.41, .441 (1994).) The purpose of both the Almond Board's generic advertising and promotion, which is paid for out of those "advertising assessments" actually collected from handlers, and the branded advertising and promotion, which the Almond Board encourages, through the credits, is to achieve the Almond Order's asserted goal. (7 C.F.R. § 981.41 (1994).)

4. There are two distinct Almond Board advertising and promotion programs referenced in this proceeding. The first program, the "creditable advertising" program, was in effect through and including the 1992-93 crop year and was essentially a program of creditable industry advertising with a small Almond Board generic advertising element. (7 C.F.R. §§ 981.41, .441 (1993).) The second program, the "credit-back" program, began with the 1993-94 crop year. The "credit-back" program is a large generic advertising, promotion, and public relations program operated by the Almond Board, with various efforts in both the domestic and export markets. These efforts included a television commercial (Tr. 2081-83), a public relations program (RX 255-256; Tr. 1205-06), an almond promotion program for foreign markets (Tr. 369-71, 2106-09, 2215-17), research on new product development (RX 259; Tr. 1301-02, 1311-12), and consumer and industry research (RX 243; Tr. 1313-23). The credit-back program allows handlers to receive partial credit back for many more forms of branded advertising and brand promotion than were allowed under the creditable program. (7 C.F.R. §§ 981.41, .441 (1994).)

5. The Almond Board seeks through its generic advertising and promotion activities to build demand through

the changing of consumer preferences by providing information to manufacturers and end users about the essential features of almonds. (RX 248 at 2, RX 260 at 2.)

6. Increasing the demand for a product involves influencing consumer attitudes so that more of a product can be sold at the given price, the same amount can be sold at a higher price, or more of the product can be sold at a higher price. (RX 250 at 2-3, RX 251 at 2.) Expansion of demand benefits producers as a group because their revenues increase. (RX 248 at 12-13.)

7. The marketing mix available to firms and organizations marketing products and services includes advertising, promotion, publicity, and public relations. (RX 249 at 2; Tr. 817-18.)

8. Advertising is defined as paid broadcasting of a message in the television, radio, or print media. It can also involve the providing of point-of-purchase materials to retailers. Promotion involves the placing of information oriented messages such as a product's nutritional aspects or suggestions for its preparation, in the various media.

9. Since advertising is an efficient way of reaching a large number of people, organizations that market products that are aimed directly to consumers spend considerable sums on advertising. (RX 251 at 2.)

10. Generic advertising is the cooperative effort among producers of a nearly homogenous product to disseminate information about the underlying general attributes of the

product to existing and potential customers for the purpose of strengthening demand for the commodity. (RX 249 at 3-4, RX 260 at 1, RX 264 at 1-3.)

11. Branded advertising is the effort of an individual firm in the product category that emphasizes the particular attributes of its brand as compared to competing bands. (RX 260 at 1, RX 264 at 3.)

12. Brand and generic advertising can be complementary when they have mutually reinforcing effects on consumer choice. (RX 248 at 2, 4, RX 260 at 1.)

13. The *Law of One Price*, which states that, once cost differentials are excluded, every firm in the marketing channel receives the same price, applies to the almond industry. (RX 251 at 7; Tr. 687-88.) Because the *Law of One Price* applies in the almond industry, the benefits of an effective advertising program accrue to everyone who sells the commodity. (RX 251 at 7; Tr. 655, 664.)

14. The rationale for mandatory collection of advertising and promotion assessments is that everyone who benefits from advertising should share equitably in its cost and not be a "free rider." (RX 250 at 2, 6, RX 251 at 3-5, RX 254 at 2, RX 260 at 5; Tr. 983-84.) The mandatory collection of funds to support programs to benefit industries composed of many producers is essential for success of the program. (RX 254 at 2.) Voluntary programs, even when supported financially by an overwhelming majority of an industry, fail because of "free riders" who are able to enjoy the same benefits as those supporting the program. (RX 251 at 4, RX 254 at 2; Tr. 983-84.)

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15. The phenomenon of tax shifting results in the incidence of a tax being ultimately shared with other entities in the marketing channel. (Tr. 690.) Tax shifting in a cooperative advertising program results in the greatest incidence of the cost of the program being borne by that side of the market that has the least elastic supply response. In the agriculture industry, producers have the least elastic supply response. (RX 248 at 4; Tr. 331, 690-94, 1538, 2461-67.)

16. All six agricultural economists called by Respondent as expert witnesses, Dr. Ronald Ward, Dr. Henry Kinnucan, Dr. Richard Sexton, Dr. Jason Christian, Dr. Hoy Carman, and Dr. Olan Forker, are experienced researchers on the impact of advertising on commodities. (RX 248, 250, 251, 252, 254, 260; Tr. 618, 833, 921, 994, 1160, 1446.) Dr. Russell Winer and Dr. Margaret Campbell, professors of marketing, are experts in the area of advertising theory. (RX 249, 264; Tr. 775, 1731.) The agricultural economist called by Petitioners, Professor Michael K. Wohlgenant, is also an experienced researcher. (PJ 2; Tr. 1787.) Professor Scott Davis, who was called by Petitioners, is an expert in the area of marketing and advertising theory as well as economics. (PJ 1; Tr. 1983.)

17. The testimony of the agricultural economists called by Respondent and the empirical results from their studies on various agricultural commodities confirm that cooperative generic advertising and promotion can be a viable tool for building demand and ultimately increasing producer returns. (RX 248, RX 250-251, RX 254, RX 260.)

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18. The Almond Board retained the firm of Hallberg, Schierson & Company to determine the effectiveness of the Almond Board's generic advertising program. (Tr. 327.) On January 28, 1991, Hallberg, Schireson & Company submitted *A Report of a Research Study of Domestic Almond Sales and Customers, Advertising and Public Relations Programs to Promote California Almonds* to the Almond Board. (RX 265.) The Hallberg, Schireson & Company report states that the "programs appear correctly targeted and well received", but "there is significant room for improvement by better differentiating almonds from other nuts." The Hallberg, Schireson & Company report concludes that the Almond Board should continue its public relations efforts aimed at institutional purchasers and shift current consumer public relations from a recipe-ingredient focus to consumer-directed messages based on a strong "differentiating positioning." (RX 265; Tr. 2087-88, 2235.)

19. Dr. Christian concluded a study on September 19, 1994, entitled *The Economic Effects of Advertising in the California Almond Industry* in which he found advertising expenditures in the past have had a significant impact on the demand for California almonds. Since creditable branded advertising constituted almost all advertising and Blue Diamond Growers, Inc., advertising constituted a large majority of the branded advertising during this time, Dr. Christian's study uses Blue Diamond advertising expenditures to measure the effectiveness of branded almond advertising. Dr. Christian found that for every dollar spent on Blue Diamond Growers, Inc., advertising, growers benefitted with $5 of increased returns. Advertising has contributed to higher prices received for each year's crop.

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Branded advertising has had a positive impact not just on the demand for the branded product, but on the demand faced by the industry as a whole and leads to higher prices for all almonds. (RX 159 at 20-21.)

20. None of Dr. Christian's studies measured the effect of advertising after 1992, and the Almond Board's current advertising and promotional activity was not examined by Dr. Christian. (Tr. 1004.)

21. Petitioners are not prohibited or restrained by the AMAA, the Almond Order, or the Almond Board from advertising or promoting their own brands of almonds or communicating any other message to any audience.

22. The Almond Order provides that Petitioners may advertise their own brand of almonds and receive a credit against their assessments for their branded advertising. Neither the credit-back program nor the creditable program requires handlers to advertise, but rather, both programs give the handler the option to advertise and receive credit for promotional expenditures as provided in the Almond Order. While both the credit-back and creditable programs limit the type of promotion for which a handler may receive credit, neither the credit-back program nor the creditable program prohibits or restricts a handler from promoting or advertising almonds in any other way or from communicating any other message to any audience. (7 C.F.R. §§ 981.41, .441. (1993); 7 C.F.R. §§ 981.41, .441. (1994).)

23. The Almond Promotion Program does not include political or ideological views. Petitioners are not compelled

by the AMAA, the Almond Order, or the Almond Board to endorse or finance any political or ideological views.

24. The Almond Board has not identified Petitioners in any of its promotional events, and the Almond Board's promotion program does not compel Petitioners to speak. Petitioners are not compelled by the AMAA, the Almond Order, or the Almond Board to engage in actual or symbolic speech.

25. The record reveals that the generic advertising conducted by the Almond Board in accordance with the Almond Order and the branded advertising conducted in accordance with the Almond Order are germane to the purposes of the Almond Order.

B. The Petitioners

Amaretto Orchards

26. Amaretto Orchards is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

27. Amaretto Orchards' mailing address and principal place of business is 2000 Oak Street, 1-B, Bakersfield, California 93301. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(C); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 3.)

28. Amaretto Orchards is a California general partnership which was formed in 1986. The partners in Amaretto Orchards are Bruce L. Beretta, David Beretta, Franco Beretta, Marco Beretta, Sandra Beretta, Norman Gilfenbain, Stuart Gilfenbain, and George Gill. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(C); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 3.)

29. The Almond Order's Promotion Plan requires Amaretto Orchards to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Amaretto Orchards seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Amaretto Orchards for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 27.)[16]

30. Amaretto Orchards became a handler of almonds during the 1986-87 crop year and handles between 1.1 million

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16. Petitioners in the proceeding captioned 94 AMA Docket No. F&V 981-7 requested refunds of assessments by the Almond Board for advertising and promotion back to the 1980-81 crop year (Petition filed in 94 AMA Docket No. F&V 981-7). However, in their proposed conclusions, Petitioners in the proceeding captioned 94 AMA Docket No. F&V 981-7 only make claim for assessments back to the 1986-87 crop year. (Petitioners' Proposed Findings of Fact and Conclusions of Law at 49-52.) Further, Petitioners in the proceeding captioned 94 AMA Docket No. F&V 981-7 do not appeal the Chief ALJ's Conclusions of Law which only relate to crop years 1986-87 through 1994-95 (Initial Decision and Order at 69.)

pounds of almonds and 1.8 million pounds of almonds each crop year. Approximately 70 per centum of Amaretto Orchards' almonds are exported. Amaretto Orchards has no retail brand, but sells brown almonds (almonds that are not manufactured) for use as an ingredient in other products, primarily cereals. (AO 1 ¶ 1; Tr. 1954-56.)

31. From 1986 through the 1992-93 crop year, when the creditable advertising program was in effect, Amaretto Orchards typically purchased ½-ounce packages of snack almonds from the Almond Board to give them to charities so that Amaretto Orchards could receive 150 per centum credit for those purchases pursuant to the Almond Order. (AO 1 ¶ 2.)

32. On a couple of occasions, Amaretto Orchards advertised its almonds pursuant to the Almond Order. However, Amaretto Orchards would not have engaged in this advertising but for the Almond Board's Promotion Program. (AO 1 ¶ 2.)

33. Amaretto Orchards believes that the best way to promote its almonds is by engaging in direct one-on-one salesmanship with buyers and customers; by bringing buyers to its plant and entertaining the buyers while visiting its plant; and by traveling to Italy to promote its almonds. (AO 1 ¶ 3.)

34. If Amaretto Orchards could retain for its own use the money it pays to the Almond Board for the advertising program, Amaretto Orchards would use the money to increase the quality control system at its facility in order to expand the number of potential buyers of its product. (AO 1 ¶ 3.)

Appendix D

Bal Nut, Inc.

35. Bal Nut, Inc., is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

36. Bal Nut, Inc.'s mailing address is 191 E. Center Hill Road, Dallas, Pennsylvania 18612. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 1.)

37. Bal Nut, Inc.'s principal place of business is Valley Home, California. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 1.)

38. Bal Nut, Inc., is a corporation which was incorporated in the Commonwealth of Pennsylvania on June 1, 1989. Mr. Vito Balice is the president of Bal Nut, Inc., and Ms. Domicella Balice is the secretary and treasurer of Bal Nut, Inc. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 1.)

39. The Almond Order's Promotion Plan requires Bal Nut, Inc., to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Bal Nut, Inc., seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they

applied to Bal Nut, Inc. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 29.)

40. Bal Nut, Inc., handles approximately 150,000 to 300,000 pounds of almonds each year. Approximately 80 per centum of its almonds are exported. (BN 1 ¶ 1; Tr. 263-67.)

41. Mr. Vito Balice believes that the best way to promote Bal Nut, Inc.'s product is to travel to various countries to meet buyers, engage in one-on-one sales efforts with those buyers, and have follow-up phone calls with those buyers. Bal Nut, Inc., engages in these activities in an effort to assure buyers that Bal Nut, Inc., can supply the product the buyers require. (BN 1 ¶ 1.)

42. Since 1989, Bal Nut, Inc., has generally paid the Almond Board the advertising assessments and not engaged in creditable advertising or credit-back advertising. However, on one occasion, Bal Nut, Inc., did advertise almond butter on radio station WARD in Wilkes-Barre, Pennsylvania, but the advertisement, which cost about $900 to air, only sold one pound of almond butter. (BN 1 ¶ 1; Tr. 272.)

43. If Bal Nut, Inc., was not required to participate in the Almond Board's advertising program, Bal Nut, Inc., would use the money it would save to upgrade its equipment, install a bathroom at its warehouse, and fix a leaking roof. (BN 1 ¶ 2; Tr. 269.)

Appendix D

Beard's Quality Nut Company

44. Beard's Quality Nut Company is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

45. Beard's Quality Nut Company's mailing address and principal place of business is 17495 South Seidner, Escalon, California 95320. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(B); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 2.)

46. Beard's Quality Nut Company is a sole proprietorship which was formed in 1969. Beard's Quality Nut Company is owned by Mr. Rodney Beard. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(B); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 2.)

47. The Almond Order's Promotion Plan requires Beard's Quality Nut Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Beard's Quality Nut Company seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Beard's Quality Nut Company for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 27.)[17]

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17. See note 16.

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48. Mr. Steven Beard is the manager of the almond division of Beard's Quality Nut Company and was the chairman of the public relations and advertising committee for the Almond Board for the 2 years immediately preceding the date on which Mr. Steven Beard executed his November 3, 1994, written declaration, BQN 12. The public relations and advertising committee and the Almond Board consist of growers and handlers both of whom vote on Almond Board and public relation and advertising committee recommendations with respect to Almond Board expenditures for advertising and promotion. (BQN 12 ¶ 1.)

49. From 1986 to the date of Mr. Steven Beard's November 3, 1994, written declaration, BQN 12, Beard's Quality Nut Company spent its creditable advertising assessment dollars and its credit-back dollars to avoid paying that money to the Almond Board. (BQN 12 ¶ 2.)

50. Beard's Quality Nut Company has no store shelf almonds for snacks or baking. All of Beard's Quality Nut Company products are sold as whole brown almonds and are used as ingredients in other products. Beard's Quality Nut Company's almonds are marketed throughout the world, approximately 70 per centum of which are exported and 30 per centum of which are sold in the domestic market. (BQN 12 ¶ 2.)

51. Beard's Quality Nut Company has spent an enormous amount of time and money for which it cannot receive credit either under the creditable advertising rules or the credit-back rules. These expenditures include: (1) the costs associated with personal contact with many customers

and direct mailing to those customers; (2) the cost of purchasing new facilities and equipment and improving existing facilities and equipment; (3) the costs associated with improving efficiency; and (4) the costs associated with improving the quality of Beard's Nut Company's product. (BQN 12 ¶ 3.)

52. If Beard's Quality Nut Company was not required to participate in the Almond Board's advertising program, Beard's Quality Nut Company would use the money it would save for trade publication advertisements, personal contact with buyers, promotional materials, quality line extensions at Beard's Quality Nut Company's facility in order to produce a product that would appeal even more to the industrial users and customers, Beard's Quality Nut Company sponsored seminars, and more travel to meet buyers. (BQN 12 ¶ 5.)

53. Beard's Quality Nut Company's credit-back advertising assessment, creditable advertising assessments, and administrative assessments for the 1989-90 crop year through the 1993-94 crop year are set forth in BQN 7-10.

Cal-Almond Inc.

54. Cal-Almond, Inc., is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

55. Cal-Almond, Inc.'s mailing address and principal place of business is 6049 Leedom Road, Hughson, California

95326. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 1.)

56. Cal-Almond, Inc., is a corporation which was incorporated in the State of California on April 3, 1979. Mr. Cloid Francis Angle is the president of Cal-Almond, Inc., and Mr. Tyler Angle is the secretary and treasurer of Cal-Almond, Inc. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 1; Tr. 2164.)

57. The Almond Order's Promotion Plan requires Cal-Almond, Inc., to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Cal-Almond, Inc., seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Cal-Almond, Inc., for the 1987-88 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 26.)

58. Cal-Almond, Inc., sells approximately 65 per centum of the almonds it handles for export and approximately 35 per centum in the domestic market. Most almond handlers ship only brown almonds. Beginning in 1988, Cal-Almond, Inc., extensively increased its product lines to include manufactured almonds that are sliced, diced, and blanched. (CA 3 ¶ 3.)

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59. In 1989, Cal-Almond, Inc., manufactured approximately 50 per centum of its almonds into specialty products which include blanched, sliced, diced, and super premium brown almonds. In the 1993-94 crop year, Cal-Almond, Inc., handled approximately 30 million pounds of almonds; approximately 80 per centum of these almonds were manufactured into specialty products. At the time of the hearing in this proceeding, Cal-Almond, Inc., anticipated handling approximately 40 million pounds of almonds during the 1994-95 crop year, approximately 80 per centum of which would be manufactured into specialty products. (CA 3 ¶ 3.)

60. Cal-Almond, Inc.'s manufactured items are used as ingredients in ice creams, cereals, bakery goods, candy bars, and other confectionery items. (CA 3 ¶ 5.)

61. Cal-Almond, Inc., at considerable expense, has so successfully developed the Cal-Almond label that many buyers and brokers, at the urging of an end user, have called Cal-Almond, Inc., requesting the Cal-Almond label because of its assurance of quality, timeliness of shipment, and competitive price. (CA 3 ¶ 5.)

62. In 1988, Cal-Almond, Inc., expanded its facilities to house newly purchased blanching and cutting units. The cost of the newly purchased equipment was in excess of one million dollars. In addition, Cal-Almond, Inc., incurred the cost of propane tanks to heat the blanching water, plumbing, recycled water systems, and necessary county permits. (CA 3 ¶ 6.)

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63. Since 1988, Cal-Almond, Inc., has expanded its roasting trade from pure oil roasting to dry roasting because several of Cal-Almond, Inc.'s buyers in the cereals, bakery, and candy bar trade desired dry roasted almonds; and in 1992, Cal-Almond, Inc., purchased dry roasting equipment for approximately $200,000. (CA 3 ¶ 6.)

64. Cal-Almond, Inc., has spent approximately $500,000 for additional equipment for blanching, slicing, and dicing to supply greater quality assurance and to meet customer specifications. In the summer of 1994, Cal-Almond, Inc., spent approximately $150,000 for the most modern dicing unit, again to meet buyer specifications. (CA 3 ¶ 6.)

65. In 1987 and 1988, Cal-Almond, Inc., spent $350,000 for additional cold storage warehousing so that Cal-Almond, Inc., would have the ability to market almonds throughout the crop year. (CA 3 ¶ 6.)

66. In the summer of 1994, Cal-Almond, Inc., spent one million dollars to improve and expand its shelling line, and at the time of the hearing in this proceeding, an additional warehouse was being built at a cost of $150,000. (CA 3 ¶ 6.)

67. In 1994, Cal-Almond, Inc., also installed a LMC pre-cleaning and cleaning line at a cost of $350,000. The LMC pre-cleaning and cleaning line was installed to meet major domestic and export buyer specifications. (CA 3 ¶ 7.)

68. During tours of Cal-Almond, Inc.'s facilities, visiting buyers, brokers, and customers suggested added safeguards and extra "cleanliness" developments, stating that

they would be interested in purchasing more products from Cal-Almond, Inc., if it was able to make the suggested changes. Cal-Almond, Inc., complied with these requests. (CA 3 ¶ 7.)

69. As a result of a buyer request, Cal-Almond, Inc., put in new flooring in one of its buildings for approximately $75,000, and it expanded the floor space of its roasting operation in order to allow the loading and unloading of almonds without exposing the almonds to the elements outside. In order to meet further buyer specifications, Cal-Almond, Inc., added eight electronic sorting machines at a cost of approximately $40,000 per machine to increase the quality of its product. (CA 3 ¶ 7.) Cal-Almond, Inc., has upgraded its computer systems at considerable expense to accommodate customer shipping and label making. (CA 3 ¶ 8.)

70. Since being employed by Cal-Almond, Inc., in October 1988, Mr. Bill Grant Dryden, the Quality Assurance and Production Manager, has spent approximately 30 per centum of his time with buyers and customers. He has conducted tours of Cal-Almond, Inc.'s facilities for buyers and customers; reviewed buyer specifications for products; and made adjustments for purchasers in order to comply with their specifications. When customers arrive at Cal-Almond, Inc., the company entertains them. The customers are flown in Cal-Almond, Inc.'s airplanes to Yosemite National Park, taken to breakfast, lunch, and dinner, and otherwise fully hosted at Cal-Almond, Inc.'s expense. (CA 3 ¶ 8.)

71. At least once a year, Mr. Dryden and Mr. Tyler Angle travel to Europe and other places in order to meet with customers, buyers, and brokers, and Cal-Almond, Inc., and Mr. Dryden have found that these visits are particularly valuable in promoting the Cal-Almond, Inc., product. (CA 3 ¶ 8.)

72. Mr. Dryden spends considerable time on the telephone with buyers and customers to promote Cal-Almond, Inc.'s product, listen to the concerns of buyers and customers, and provide assurances that Cal-Almond, Inc., can continue to meet buyer specifications. (CA 3 ¶ 8.) There are several Cal-Almond, Inc., employees who are constantly on the telephone with buyers and customers or meeting with buyers and customers to increase almond sales. (CA 3 ¶ 13.) These contacts are extremely important to Cal-Almond, Inc.'s promotion of its almonds. (CA 3 ¶ 8.) Mr. Dryden has worked with customers to develop new products and new manufacturing techniques in order to provide the buyers and customers with even more alternatives for almonds. (CA 3 ¶ 9.)

73. Historically, foreign and domestic buyers of almonds would buy almonds in their brown natural state, and those buyers and customers would blanch, slice, dice, and otherwise manufacture the almonds for resale or use as ingredient products. By virtue of Cal-Almond, Inc.'s quality control efforts and equipment and its salesmanship, Cal-Almond, Inc., now provides manufacturing services, which have increased Cal-Almond, Inc.'s profits. (CA 3 ¶ 9.)

74. Buyers have learned as a result of Cal-Almond, Inc.'s special expertise, quality control, and equipment, that Cal-Almond, Inc., using its own facilities and machinery, can provide those buyers with a better product than the buyers can produce with their own manufacturing equipment. Cal-Almond, Inc., has expended much time and money to convince buyers and customers to utilize Cal-Almond, Inc.'s services, and as a result, Cal-Almond, Inc., has increased the tonnage that it manufactures from approximately 50 per centum of Cal-Almond, Inc.'s sales in 1989 to approximately 80 per centum of Cal-Almond, Inc.'s sales in 1994. (CA 3 ¶ 9.) Cal-Almond, Inc., runs its blanching operation 365 days a year, 24 hours a day, to keep up with the demand for Cal-Almond, Inc.'s blanched products. (Tr. 2171-72.)

75. Cal-Almond, Inc., pays the Almond Board advertising assessments between $400,000 and $600,000 per year. (CA 3 ¶ 12.) For the 1992-93 crop year, Cal-Almond, Inc.'s creditable advertising assessment was $366,431.83. (CA 2.) Cal-Almond Inc.'s credit-back advertising assessment for the 1993-94 crop year was $288,440.30. (CA 1.) None of Cal-Almond, Inc.'s expenditures for equipment, product enhancement, or personal selling to the customers is approved for credit under the advertising provisions of the Almond Order. (CA 3 ¶ 9.)

76. Cal-Almond, Inc., has developed an almond flour, which the Almond Board never advertises. Cal-Almond, Inc., developed its own buyers for almond flour and has developed a sizeable market for almond flour. (Tr. 2169-70.)

77. If the Almond Order's Promotion Program did not exist, Cal-Almond, Inc., would continue to promote its product in the method and manner described in Findings of Fact Nos. 58-74, but would have more money for its own promotion. (CA 3 ¶ 12; Tr. 2184-85.)

78. Mr. Cloid Angle, who at the time of the hearing in this proceeding was 59 years old, has been a grower of almonds all of his life and has been an almond handler for 20 years. (Tr. 2164-66.) Mr. Cloid Angle believes that Cal-Almond, Inc., was able to grow quickly because it kept its growers happy and because of its personal service to its buyers. (Tr. 2167-68.)

Central Valley Grower Packing

79. Central Valley Grower Packing is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981). (CVG 7 ¶ 1.)

80. Central Valley Grower Packing's mailing address and principal place of business is 512 Heatherwood Drive, Madera, California 93637. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(C); Answer filed in 94 AMA Docket No. F&V 981- 4 ¶ 3.)

81. Central Valley Grower Packing is a sole proprietorship, and Mr. Robert W. Christian is the sole owner of Central Valley Grower Packing. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(C); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 3; CVG 7 ¶ 1.)

82. The Almond Order's Promotion Plan requires Central Valley Grower Packing to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Board. Central Valley Grower Packing seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Central Valley Grower Packing for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 29.)

83. Central Valley Grower Packing has no retail store shelf almonds, but sells its almonds for use as ingredients in other products. (CVG 7 ¶ 2.) More than 90 per centum of Central Valley Grower Packing's almond production during the 1986-87 crop year through the 1992-93 crop year was exported. During the 1986-87 crop year through the 1992-93 crop year, the Almond Board had no export promotional program, only a domestic promotional program. (CVG 7 ¶ 2.)

84. Central Valley Grower Packing has found that the best way to sell its almonds to its foreign buyers is to provide personalized service and meet the buyers' quality requirements. (CVG 7 ¶ 2.)

85. Central Valley Grower Packing paid the advertising assessments to the Almond Board in order to receive the 150 per centum credit. (CVG 7 ¶ 2.) Exhibits CVG 1 through CVG 6 are the Almond Board Assessment Notices to Central Valley Grower Packing showing the number of pounds of

almonds handled by Central Valley Grower Packing and the advertising assessments for the 1986-87 crop year through the 1992-93 crop year. (CVG 1-6, 7 ¶ 1.)

86. If Central Valley Grower Packing did not have to pay advertising assessments to the Almond Board for the generic almond promotion program, Central Valley Grower Packing would have used the money to further promote its product in the export market, spent more money on product research and development in an attempt to expand Central Valley Grower Packing's market, and paid growers a higher return. (CVG 7 ¶ 2.)

Del Rio Nut Company

87. Del Rio Nut Company is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981). (DRN 3 at 2.)

88. Del Rio Nut Company's mailing address is P.O. Box 396, Livingston, California 95334. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 1.)

89. Del Rio Nut Company's principal place of business is Livingston, California. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 1.)

90. Del Rio Nut Company was incorporated on December 3, 1987. Mr. David J. Arakelian is the president and chief executive officer of Del Rio Nut Company and Ms. Diane Arakelian is the secretary of Del Rio Nut

Company. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 1; DRN 3 at 2.)

91. The Almond Order's Promotion Plan requires Del Rio Nut Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Del Rio Nut Company seeks to be relieved from any obligation to pay for any promotional or marketing activities undertaken by the Almond Board. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 7.)

92. Del Rio Nut Company has been a handler of almonds since 1987. The principal markets for Del Rio Nut Company's almonds are food manufacturers and export organizations. Del Rio Nut Company has no retail sales. (DRN 3 at 2.)

93. Del Rio Nut Company's creditable advertising assessment for crop years 1987-88 through 1992-93 are stated in DRN 3 at 2-3. For the 1993-94 crop year, Del Rio Nut Company's advertising assessment was $42,168.05. (DRN 3 at 4.)

94. Mr. Arakelian believes that the most useful form of advertising Del Rio Nut Company's product is direct contact with buyers. (DRN at 3.) Mr. Arakelian promotes Del Rio Nut Company's product by informing customers of the positive qualities of the Del Rio Nut Company and its product. Mr. Arakelian personally visits customers and has customers visit the Del Rio Nut Company's facility. On one

occasion Mr. Arakelian flew 4,000 miles to visit a company which was involved in importing associated products, but was not at that point buying almonds. (Tr. 201-02.)

Frazier Nut Farms, Inc.

95. Frazier Nut Farms, Inc., is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

96. Frazier Nut Farms, Inc.'s mailing address and principal place of business is 10830 Yosemite Boulevard, Waterford, California 95386. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(C); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 3.)

97. Frazier Nut Farms, Inc., is a corporation which was incorporated in the State of California on March 30, 1981. Mr. Jim Frazier, Sr., was, at the time Frazier Nut Farms, Inc., filed its petition in the proceeding captioned 94 AMA Docket No. F&V 981-1, the president of Frazier Nut Farms, Inc.; Mr. Jim Frazier, Jr., was, at the time Frazier Nut Farms, Inc., filed its petition in the proceeding captioned 94 AMA Docket No. F&V 981-1, the vice president of Frazier Nut Farms, Inc.; and Ms. Heidi Frazier Slacks is the secretary and treasurer of Frazier Nut Farms, Inc. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(C); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 3.) Mr. Jim Frazier, Jr., became the president of Frazier Nut Farms, Inc., sometime between January 25, 1994, and November 4, 1994. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(C); FN 3 ¶ 1.)

98. The Almond Order's Promotion Plan requires Frazier Nut Farms, Inc., to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Frazier Nut Farms, Inc., seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Frazier Nut Farms, Inc., for the 1987-88 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 26.)

99. Frazier Nut Farms, Inc., handled 1,290,912 pounds of almonds in the 1992-93 crop year and 870,010 pounds of almonds in the 1993-94 crop year. (FN 1, FN 2.)

100. Frazier Nut Farms, Inc., sells brown almonds and most of its almonds are exported. Frazier Nut Farms, Inc., finds that the best way to promote its product is to meet with buyers, have one-on-one sales meetings with buyers, and make plant improvements. (FN 3 ¶ 2.) Mr. Jim Frazier, Jr., believes that the Frazier name itself generates the interest in Frazier Nut Farms, Inc.'s product. (Tr. 214-15.)

101. Frazier Nut Farms, Inc., is a much larger walnut processor than it is an almond processor, but many of Frazier Nut Farms, Inc.'s buyers buy both walnuts and almonds. Under the Almond Board's 1992-93 creditable advertising program, Frazier Nut Farms, Inc., could not obtain credit for promoting almonds along with "competing nuts," which would include walnuts. (FN 3 ¶ 2.)

102. Under the new credit-back rules, which restrict credits to two-thirds of the amount spent, a handler can receive credit for the promotion of both walnuts and almonds, but the amount of the credit reflects the portion of the product weight represented by almonds. (FN 3 ¶ 2.)

103. If there were no Almond Board advertising assessments, Frazier Nut Farms, Inc., would increase the quality control of its product, expand the types of products that Frazier Nut Farms, Inc., processes, and increase Frazier Nut Farms, Inc.'s customer base. (FN 3 ¶ 2.)

Gold Hills Nut Company, Inc.

104. Gold Hills Nut Company, Inc., is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

105. Gold Hills Nut Company, Inc.'s mailing address is P.O. Box 482, Snelling, California 95369. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(B); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 2.)

106. Gold Hills Nut Company, Inc.'s principal place of business is 3728 Turlock Road, Snelling, California 95369. (Petition filed in 94 AMA Docket No. F&V 981- 1 ¶ 1(B); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 2.)

107. Gold Hills Nut Company, Inc., is a corporation which was incorporated in the State of California on October 21, 1986. Mr. Bill Phipps is the president and chief financial

officer of Gold Hills Nut Company, Inc., and Mr. Mike Stiles is the secretary of Gold Hills Nut Company, Inc. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(B); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 2; GH 3 ¶ 1.)

108. The Almond Order's Promotion Plan requires Gold Hills Nut Company, Inc., to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Gold Hills Nut Company, Inc., seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Gold Hills Nut Company, Inc., for the 1987-88 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 26.)

109. Gold Hills Nut Company, Inc., began handling almonds in 1986. (GH 3 ¶ 1.) For the 1992-93 crop year, Gold Hills Nut Company, Inc., handled 5,632,793 pounds of almonds, all of which were sold for export. (GH 1, GH 3 ¶ 3.) For the 1993-94 crop year, Gold Hills Nut Company, Inc., handled 9,997,462 pounds of almonds, all of which were sold for export. (GH 2, GH 3 ¶ 3.)

110. Approximately 20 per centum of the crop handled by Gold Hills Nut Company, Inc., is owned and grown by Mr. Phipps. (GH 3 ¶ 3.)

111. For the 1992-93 crop year, almost all of Gold Hills Nut Company, Inc.'s creditable advertising assessment was spent buying ½-ounce packages of almonds from the Almond

Board to be distributed to schools and churches. Gold Hills Nut Company, Inc., bought them in order to receive the credit under the Almond Order advertising regulations. (GH 3 ¶ 4.)

112. At the time Mr. Phipps executed his November 3, 1994, written declaration, GH 3, Mr. Phipps expected that Gold Hills Nut Company, Inc., would handle approximately 15 million pounds of almonds during the 1994-95 crop year. In 1994, Gold Hills Nut Company, Inc., spent approximately 1½ million dollars on equipment specifically designed to provide high quality manufactured items to compete in the export market with Spanish manufactured products. At the time Mr. Phipps executed his November 3, 1994, written declaration, GH 3, Mr. Phipps expected that Gold Hills Nut Company, Inc., would spend substantial sums of money targeting those buyers who had previously bought Spanish manufactured products. Neither Gold Hills Nut Company, Inc.'s equipment purchases nor Gold Hills Nut Company, Inc.'s expenditures to target buyers may be credited against assessments under the Almond Board's advertising program. (GH 3 ¶ 5.)

113. Over the last 3 years, Gold Hills Nut Company, Inc., has, at its cost, entertained a number of customers who have come to the Gold Hills Nut Company, Inc.'s facility. Gold Hills Nut Company, Inc., entertains these customers as part of its effort to prove to those customers that Gold Hills Nut Company, Inc., can provide the best quality product possible with timely shipments and excellent service. None of these entertainment expenditures may be credited against assessments under the advertising provisions of the Almond Order. (GH 3 ¶ 6.)

114. Gold Hills Nut Company, Inc., not only contacts buyers that already buy almonds, but also has contacted potential customers that have not previously bought almonds. (Tr. 1916-18.)

115. Gold Hills Nut Company, Inc., has slightly discounted its price to buyers overseas who advertise products which are made from Gold Hills Nut Company, Inc.'s almonds. Gold Hills Nut Company, Inc., believes this to be a good investment because the buyer will buy more of Gold Hills Nut Company, Inc.'s product when consumption increases as a result of the buyers' advertising program, but the discount provided by Gold Hills Nut Company, Inc., may not be credited against assessments under the advertising provisions of the Almond Order. (Tr. 1929-31.)

116. The new credit-back program has expanded the ways in which a handler may receive credit for market promotion activities, but Gold Hills Nut Company, Inc., believes the new credit-back regulations to be even more burdensome than the creditable regulations in that a handler can receive only two-thirds credit for its expenditures for qualified promotional activities under the credit-back regulations. (GH 3 ¶ 7.)

117. Gold Hills Nut Company, Inc., believes that it knows best how to market its product; that the competitive returns that Gold Hills Nut Company, Inc., has paid its growers have not been caused by any Almond Board advertising program; and that if the Almond Board's advertising program did not exist, Gold Hills Nut Company, Inc., could make more money and could pay its growers more money. (GH 3 ¶ 7.)

Appendix D

Hocker Nut Farm

118. Hocker Nut Farm is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981). (HNF 6 ¶ 1.)

119. Hocker Nut Farm's mailing address and principal place of business is 10526 Goulart Road, Turlock, California 95380. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(D); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 4).

120. Hocker Nut Farm is a California partnership, and the partners are Doyle Hocker and Steve Hocker. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(D); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 4; HNF 6 ¶ 1.)

121. The Almond Order's Promotion Plan requires Hocker Nut Farm to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Hocker Nut Farm seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Hocker Nut Farm for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 29.)

122. Hocker Nut Farm has been a handler of almonds from and including the 1986-87 through the 1993-94 crop years. During the period 1986 through 1993, Hocker Nut

Farm handled the pounds of almonds listed in paragraph 1 of Mr. Steve Hocker's November 3, 1994, written declaration, HNF 6. (HNF 6 ¶ 1.)

123. Approximately 95 per centum of Hocker Nut Farm's almonds are exported, and Hocker Nut Farm only sells brown almonds, not manufactured almonds. However, Hocker Nut Farm custom manufactures products for other handlers. (HNF 6 ¶ 1.)

124. Hocker Nut Farm has found that the best way to promote its product is salesmanship and one-on-one conversations with its buyers. (HNF 6 ¶ 2.) Hocker Nut Farm sells its almonds through personal contacts and has communicated with manufacturers that do not currently use almonds in an effort to convince them to use almonds in their products. (Tr. 254-55.)

125. During the time the creditable advertising rules were in effect, Hocker Nut Farm would advertise that its country store sells almonds. Further, Hocker Nut Farm advertised its product in the newspaper and on the radio, but with very limited success. (Tr. 256.) However, once the Almond Board approved receiving 150 per centum credit for early payments of the advertising assessments, Hocker Nut Farm paid the Almond Board directly, virtually every year, in order to receive the 150 per centum credit. (HNF 6 ¶ 2.)

126. If Hocker Nut Farm was not required to participate in the Almond Board's advertising program, Hocker Nut Farm would use the money that it saves to increase the

efficiency and improve the quality of Hocker Nut Farm's equipment. (HNF 6 ¶ 2.)

Jardine Organic Ranch

127. Jardine Organic Ranch is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

128. Jardine Organic Ranch's mailing address and principal place of business is 910 Nacimiento Lake Drive, Paso Robles, California. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(E); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 5.)

129. Jardine Organic Ranch is a sole proprietorship, and Mr. Duane Jardine is the sole owner of Jardine Organic Ranch. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(E); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 5.)

130. The Almond Order's Promotion Plan requires Jardine Organic Ranch to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Jardine Organic Ranch seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Jardine Organic Ranch for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 29.)

131. From crop year 1986-87 through the date on which Mr. Duane Jardine executed his November 3, 1994, written declaration, Jardine Organic Ranch has marketed only organically grown almonds, and organically grown almonds account for less than 1 per centum of all of the almonds grown in California. (JOR 1 ¶ 1.)

132. Jardine Organic Ranch handles between 40,000 and 120,000 pounds of almonds per year, and Jardine Organic Ranch is assessed between $1,000 and $3,500 per year by the Almond Board for the generic advertising program. (JOR 1 ¶ 1.)

133. All of Jardine Organic Ranch's buyers insist upon organically grown and processed almonds; and therefore, Jardine Organic Ranch's almonds do not compete with 99 per centum of the almonds grown in California. (JOR 1 ¶ 1.)

134. Jardine Organic Ranch's buyers are willing to pay a premium price for organically grown almonds. The Almond Board's promotional program has never promoted or advertised organically grown almonds, and Jardine Organic Ranch does not want to be associated with any organization that does not promote organically grown products. (JOR 1 ¶ 1.)

135. Jardine Organic Ranch markets its almonds by contacting buyers by telephone and meeting potential buyers at Jardine Organic Ranch's booths at food expositions. Other buyers learn of Jardine Organic Ranch's product through promotional work done by the Farm Verified Organic Program, an organization which is not connected to the

Almond Board and which promotes certified organic products. (JOR 1 ¶ 2.) On several occasions, Jardine Organic Ranch has redesigned boxes and packaging using different labeling and sizes to accommodate customers, but Jardine Organic Ranch received no credit under the advertising provisions of the Almond Order for expenses connected with these efforts. (JOR 1 ¶ 2.) On at least two occasions since the 1986-87 crop year, Jardine Organic Ranch has spent money bringing customers to Jardine Organic Ranch's premises, but Jardine Organic Ranch does not receive credit for the cost of funding these visits under the advertising provisions of the Almond Order. (JOR 1 ¶ 2.)

136. Jardine Organic Ranch has received credit for billboard advertising in California and is eligible for credit-back on its participation at food trade shows, but Jardine Organic Ranch is not eligible for credit against assessments under the Almond Order for any of the other methods by which Jardine Organic Ranch promotes its product. (JOR 1 ¶ 3; Tr. 288-89.)

137. Jardine Organic Ranch has been a long-time critic of the generic advertising program under the Almond Order. (JOR 1 ¶ 5.)

Monte Cristo Packing Company

138. Monte Cristo Packing Company is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

139. Monte Cristo Packing Company's mailing address is 11173 W. Mercedes Avenue, Livingston, California 95334. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 1.)

140. Monte Cristo Packing Company's principal place of business is in Livingston, California. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 1.)

141. Theron Shamgochian, Inc., d/b/a Monte Cristo Packing Company, is a corporation which was incorporated in the State of California on July 25, 1979. Mr. Theron Shamgochian is the president of Monte Cristo Packing Company and Mr. William F. Fleisig is the secretary of Monte Cristo Packing Company. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 1.)

142. The Almond Order's Promotion Plan requires Monte Cristo Packing Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Monte Cristo Packing Company seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Monte Cristo Packing Company for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 27.)[18]

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18. See note 16.

143. Monte Cristo Packing Company sells all of its almonds for use as an ingredient in other products. Monte Cristo Packing Company sells a substantial amount of its almonds in Japan, Hong Kong, Korea, Macao, and Mexico. (MC 8 ¶¶ 3, 4.)

144. The Almond Board does not advertise in Mexico, and Monte Cristo Packing Company incurred costs to enter the Mexican market. (MC 8 ¶ 4.) Mr. Shamgochian, his son, and other representatives of Monte Cristo Packing Company frequently travel to Europe, Russia, Japan, and Korea to meet with potential customers. (MC 8 ¶¶ 5, 6.) Monte Cristo Packing Company entertains clients by: (1) hosting a golf tournament in Japan; (2) hosting an annual golf tournament and dinner in the United States for the entire almond industry, which includes growers, packers, brokers, exporters, importers, candy industry representatives, and foreign users; (3) supplying private airplanes, limousines, and automobiles to visiting almond buyers and paying the cost of their stay in California; and (4) providing vacation stays for brokers, importers, and users. (MC 8 ¶¶ 6-8.) Monte Cristo Packing Company has spent over $2 million in the last 10 years on plant improvements so that Monte Cristo Packing Company could be certified by all major domestic candy manufacturers, including M&M Mars, Hershey Chocolates, Sees Candies, Russell Stover, and Banner Candy. (MC 8 ¶ 12.) Monte Cristo Packing Company did not receive credit against advertising assessments under the Almond Order for any of the expenses related to entering the Mexican market, travel, entertainment, and capital improvements.

145. If the Almond Order's Promotion Program were discontinued, Monte Cristo Packing Company would continue to promote its product. (MC 8 ¶ 14.)

146. Monte Cristo Packing Company's creditable advertising assessments for the 1986-87 crop year through the 1988-89 crop year and the 1990-91 crop year through the 1992-93 crop year are set forth in MC 1-6. Monte Cristo Packing Company did not handle almonds in the 1989-90 crop year. Monte Cristo Packing Company's credit-back advertising assessment for the 1993-94 crop year is set forth in MC 7.

Monte Vista Farming Company

147. Monte Vista Farming Company is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981). (DRN 4 at 2.)

148. Monte Vista Farming Company's mailing address is P.O. Box 579, Denair, California 95316. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 2.)

149. Monte Vista Farming Company's principal place of business is Denair, California. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 2.)

150. Monte Vista Farming Company is a sole proprietorship owned by James Crecelius. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 2; DRN 4 at 2.)

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151. The Almond Order's Promotion Plan requires Monte Vista Farming Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Monte Vista Farming Company seeks to be relieved from any obligation to pay for any promotional or marketing activities undertaken by the Almond Board. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 7.)

152. Monte Vista Farming Company has been a handler of California almonds since 1985. The number of pounds of almonds handled by Monte Vista Farming Company during each crop year from crop year 1987-88 through crop year 1992-93 is set forth in DRN 4 at 2-3.

153. Monte Vista Farming Company's almonds are sold to food manufacturers and export organizations and have never been sold in the retail market. (DRN 4 at 2.)

154. Monte Vista Farming Company sells almonds by establishing and maintaining personal relationships with buyers, maintaining name recognition, and offering almonds for sale at a reasonable price. (DRN 4 at 3; Tr. 185-86.)

155. Monte Vista Farming Company's advertising assessment for the 1993-94 crop year is $65,561.87, which includes $.60 per pound that Mr. Crecelius estimates is the portion of the administrative and research assessment which was used for advertising. (DRN 4 at 4.)

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Rotteveel Orchards

156. Rotteveel Orchards is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981). (RO 9 ¶ 1.)

157. Rotteveel Orchards' mailing address is P.O. Box 579, Dixon, California 95620. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(F); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 5.)

158. Rotteveel Orchards' principal place of business is 6183 Reddick Lane, Dixon, California. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(F); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 5.)

159. Rotteveel Orchards is a California partnership, and the partners are Neal Rotteveel and John Rotteveel. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(F); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 5; RO 9 ¶ 9.)

160. The Almond Order's Promotion Plan requires Rotteveel Orchards to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Rotteveel Orchards seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Rotteveel Orchards for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 29.)

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161. Rotteveel Orchards grows and markets almonds and has been an almond handler since 1986. (RO 9 ¶ 1.)

162. Rotteveel Orchards' advertising assessments for the 1987-88 through 1993- 94 crop years are set forth in RO 1 through RO 8 and RO 10. Rotteveel Orchards does not have the assessment notice for the 1986-87 crop year. (Rotteveel RO 9 ¶ 1.)

163. Rotteveel Orchards is a small handler of almonds and exports 80 per centum of its almonds, primarily to the Netherlands. (RO 9 ¶ 1.)

164. Rotteveel Orchards promotes its product to buyers by bringing the buyers to Rotteveel Orchards' facilities. Messrs. John and Neal Rotteveel have also traveled to Europe and Latin America to meet with prospective buyers and established buyers. (RO 9 ¶ 1.) Because the Rotteveels are from the Netherlands, Rotteveel Orchards has a great market there. The buyers from the Netherlands are impressed with the quality of product that Rotteveel Orchards can ship to them and the Rotteveels' ability to directly communicate with them. Providing a quality product, traveling, and communicating directly with buyers costs money, but Rotteveel Orchards receives no credit for these costs under the advertising provisions of the Almond Order. (RO 9 ¶¶ 1, 3.)

165. Generally, Rotteveel Orchards paid advertising assessments directly to the Almond Board in order to earn the 150 per centum credit available under the Almond Order. Occasionally, Rotteveel Orchards advertised its own product

to obtain credit pursuant to the advertising provisions in the Almond Order. (RO 9 ¶ 2.) Several years prior to the date on which John Rotteveel executed his November 14, 1994, written declaration, RO 9, Rotteveel Orchards ran a television advertisement promoting its almonds. (RO 9 ¶ 1.)

166. If Rotteveel Orchards did not have to pay Almond Board assessments and did not spend money on creditable or credit-back advertising, Rotteveel Orchards would use the money to increase its market by engaging in more direct contact with existing and prospective customers (RO 9 ¶ 1), increasing its processing lines in order to provide more buyers with the quality and packaging that they require (RO 9 ¶ 1), and purchasing new lines of equipment to provide buyers with specialty almond products. (Tr. 467-68.)

Treehouse Farms, Inc.

167. Treehouse Farms, Inc., is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

168. Treehouse Farms, Inc.'s principal place of business is 5201 California Avenue, Suite 370, Bakersfield, California 93309. (Petition filed in 94 AMA Docket No. F&V 981-5 ¶ 2; Answer filed in 94 AMA Docket No. F&V 981-5 ¶ 2.)

169. Treehouse Farms, Inc., is a corporation duly authorized under the laws of the State of California. (Petition filed in 94 AMA Docket No. F&V 981-5 ¶ 3; Answer filed in 94 AMA Docket No. F&V 981-5 ¶ 3.) Mr. David James

Fitzgerald is the president of Treehouse Farms, Inc.; Mr. Richard Atkinson is the secretary of Treehouse Farms, Inc.; and Mr. David Morgan is the treasurer of Treehouse Farms, Inc. (Petition filed in 94 AMA Docket No. F&V 981-5 ¶ 4; Answer filed in 94 AMA Docket No. F&V 981-5 ¶ 4; Tr. 71.)

170. The Almond Order's Promotion Plan requires Treehouse Farms, Inc., to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Treehouse Farms, Inc., seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Treehouse Farms, Inc., for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-5 ¶ 12.)

171. Treehouse Farms, Inc., is a mid-sized almond handler that sells virtually all of its almonds for use as ingredients in other products. Treehouse Farms, Inc., does not sell any retail products. Treehouse Farms, Inc.'s sales are effectuated through almond brokers to manufacturers of products that use almonds as ingredients. (TREE 9 ¶ 2.)

172. Approximately 80 per centum of Treehouse Farms, Inc.'s almonds are sold into the foreign market. Over several years immediately preceding the date on which Mr. Fitzgerald executed his November 3, 1994, written declaration (TREE 9), Treehouse Farms, Inc.'s foreign sales have risen dramatically, whereas its domestic sales have risen only gradually. (TREE 5, TREE 9 ¶ 3.)

173. Treehouse Farms, Inc., opposes the Almond Board's generic advertising program. (TREE 9 ¶ 4.) Mr. Fitzgerald believes that a fair price, efforts to contact customers, visits to potential customers at their facilities, visits by potential customers to Treehouse Farms, Inc.'s facilities, and creation of new and improved products by investing in new and improved technologies and quality control sells almonds for Treehouse Farms, Inc. (TREE 9 ¶ 4, TREE 10 ¶ 2.)

174. Treehouse Farms, Inc., conducts a limited amount of its own advertising for name recognition purposes only. Treehouse Farms, Inc.'s advertisements have appeared in three magazines, *The Clipper*, *The Cracker*, and *Nut Grower*. (TREE 1-4, TREE 9 ¶ 7; Tr. 113.)

175. Treehouse Farms, Inc., has developed a new product that is a slivered almond that is exported to Japan for use in a dried fish product. Treehouse Farms, Inc., spent its own funds to develop this market and Treehouse Farms, Inc.'s effort has resulted in the sale of more almonds. (Tr. 116-17.)

176. Treehouse Farms, Inc., does not consult with the Almond Board or any public relations or advertising committee or with its growers as to how Treehouse Farms, Inc., should market its almonds. (Tr. 125.)

177. The amount of advertising assessment Treehouse Farms, Inc., has paid to the Almond Board for the 1986-87 crop year and the 1988-89 through the 1993-94 crop years are contained in TREE 6 and TREE 8. (TREE 9 ¶ 8.)

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C. Blue Diamond Growers, Inc.

178. Blue Diamond Growers, Inc., is a grower-owned cooperative in the almond industry which at the time of the hearing in this proceeding had approximately 5,000 grower members. (Tr. 298.) Respondent has estimated that Blue Diamond Growers, Inc., represented well over 60 per centum of the industry from 1960 through 1980, and after 1980, represented over 50 per centum of the industry through the 1990-91 crop year. (Tr. 1593.) Blue Diamond Growers, Inc., sells almonds in approximately 96 countries. (Tr. 298.) Domestically, Blue Diamond Growers, Inc., sells almonds to be used as ingredients in other products and sells its own retail line of store shelf snack almonds. (Tr. 298-99.) Approximately 90 per centum of all almonds sold in the domestic retail trade, either as snacks or for home cooking use, are sold by Blue Diamond Growers, Inc. (Tr. 343.) The retail line of almonds, which includes snack almonds, almonds that a consumer would buy for baking purposes, and bulk almonds sold to the produce departments of grocery chains, makes up only 20 to 30 per centum of all almonds sold domestically or 10 to 15 per centum of all almonds sold worldwide. (Tr. 342-43.) Blue Diamond Growers, Inc., controls close to 90 per centum of that retail almond market. (Tr. 343.)

179. Blue Diamond Growers, Inc.'s primary competition for the snack almond trade is from companies not regulated under the marketing order, such as Fishers and Planters. Blue Diamond Growers, Inc.'s primary competition for the cooking almond trade is more likely to be from other handlers regulated under the marketing order. (Tr. 343-44.)

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180. The percentage of the domestic sales that go to retail markets has not increased over the last 5 years. A premium price is paid for retail almonds as compared to almonds for use as an ingredient in other products. (Tr. 344.)

181. From the 1980-81 crop year through the 1986-87 crop year, the Almond Board spent between $87,000 and $373,000 per year on generic advertising, promotion, and public relations related to almonds. (PJ 13.) From the 1980-81 crop year through the 1986-87 crop year, Blue Diamond Growers, Inc., spent between $5,100,000 and $11,000,000 per year on creditable advertising. (PJ 10.) During the 1987-88 through the 1990-91 crop years, the total expenditure by the Almond Board for generic advertising, promotion, and public relations ranged between $840,000 and $1,400,000 per year, whereas during the same period, Blue Diamond Growers, Inc., spent between $8,000,000 and $14,200,000 per year on its branded advertising which was primarily directed to the domestic retail market. (PJ 10.)

182. Mr. Algernon Greenlee is a retail business manager for Blue Diamond Growers, Inc., and for the 6 years immediately prior to the hearing in this proceeding had been Blue Diamond Growers, Inc.'s advertising manager. (Tr. 297.)

183. Blue Diamond Growers, Inc., has advertised almonds on television and radio and in the print media. (Tr. 299.) Blue Diamond Growers, Inc.'s various types of advertising have been effective both for Blue Diamond Growers, Inc., and the almond industry at large. (Tr. 300.)

184. Because the Almond Board's advertisement assessment rate was lowered and Blue Diamond Growers, Inc., decided to use some additional funds for international advertising, Blue Diamond Growers, Inc., has decreased the amount it spends on domestic advertising. Recently, Blue Diamond Growers, Inc., reduced the amount it spends on television advertising and increased the amount it spends on radio and print media advertising. (Tr. 306-07.) In approximately 1990, Blue Diamond Growers, Inc., spent approximately $7 million on television advertising, but at the time of the hearing in this proceeding, Blue Diamond Growers, Inc., was only spending $2 to $3 million per year on television advertising. (Tr. 363-64.)

185. Blue Diamond Growers, Inc., has no research which shows whether its advertisements actually increased consumption of Blue Diamond Growers, Inc.'s almonds. However, since around 1970, per capita yearly consumption of almonds has risen from .38 pounds to as high as .86 pounds in the 1990's, prices for almonds have risen, and public awareness of almonds and Blue Diamond almonds has increased. (Tr. 300, 313-17.) When the advertising assessment rate was 2½ cents per pound, Blue Diamond Growers, Inc., believes that the rate hurt returns to their growers; it did not earn Blue Diamond Growers, Inc., more than the 2½ cents that was spent. However, based on per capita consumption numbers, Blue Diamond Growers, Inc., believes that the almond industry benefitted from the expenditure. (Tr. 339.)

186. Blue Diamond Growers, Inc., will not advertise when it does not realize a favorable return on the dollars spent. (Tr. 319-20, 339, 364.)

187. Blue Diamond Growers, Inc., has a sales force of 11 people in the United States that calls on customers. While not as efficient as advertising, this sales force helps promote the sale of almonds. (Tr. 321-22.)

188. Blue Diamond Growers, Inc., would not support a total generic program run by the Almond Board, but favors a "blended program that encourages the individual handlers to support their businesses." (Tr. 333.)

189. Blue Diamond Growers, Inc., does not need encouragement from the United States Department of Agriculture to promote its almond products and would continue to engage in branded advertising in the absence of the Almond Order's Promotion Program. (Tr. 334-35, 339.) However, Blue Diamond Growers, Inc., sets its advertising expenditures in accordance with the assessment rate. (Tr. 338, 351.)

190. Blue Diamond Growers, Inc., is concerned that in the absence of the Almond Order's Promotion Plan, it would spend more money on advertising than competing handlers. (Tr. 351.)

II. Discussion

It is well settled that the burden of proof in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) rests with the petitioner.[19] Petitioners have

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19. *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-17 (Cont'd)

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(Cont'd)

(3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *United States v. Mills*, 315 F.2d 828, 836, 838 (4th Cir.), *cert. denied sub nom. Willow Farms Dairy, Inc. v. Freeman*, 374 U.S. 832 (1963), *cert. denied*, 375 U.S. 819 (1963); *Sterling Davis Dairy v. Freeman*, 253 F. Supp. 80, 83 (D.N.J. 1965); *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-36 (D.N.J. 1964), *aff'd*, 350 F.2d 978 (3d Cir. 1965), *cert. denied*, 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo., 1945), *aff'd*, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc. v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd*, 149 F.2d 860 (3d Cir. 1945); *In re Daniel Strebin*, 56 Agric. Dec. __, slip op. at 40-41 (Nov. 26, 1997); *In re Auvil Fruit Co.*, 56 Agric. Dec. __, slip op. at 35-42 (Aug. 13, 1997); *In re Midway Farms, Inc.*, 56 Agric Dec. 102, 112-13 (1997); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 39 (1997); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 54 (1995); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 32 (1994), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 11 (1990); *In re Belridge Packing Corp.*, 48 Agric. Dec. 16, 72-73 (1989), *aff'd sub nom. Farmers Alliance for Improved Regulations (FAIR) v. Madigan*, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1374 (1987), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 81 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Moser Farms Dairy, Inc.*, 41 Agric. Dec. 7, 8-9 (1982); *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1701 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 401-02 (1974); *In re Fitchett Brothers, Inc.*, 31 Agric. Dec. 1552, 1571 (1972); *In re Clyde Lisonbee*, 31 Agric. Dec. 952, 961 (1972); *In re Adam L. Liptak*, 24 Agric. Dec. 1176, 1181 (1965).

the burden of proving that the challenged provisions of the Almond Order or obligations imposed in connection with the Almond Order are "not in accordance with law" (7 U.S.C. § 608c(15)(A)). Based upon a careful consideration of the record, I find that Petitioners have not met their burden of proof.

Petitioners contend that the requirement in the Almond Order that Petitioners pay assessments, which are then used to promote almonds, violates Petitioners' right to freedom of speech under the First Amendment of the Constitution of the United States. The Chief ALJ agreed with Petitioners' contention that the Almond Order violates Petitioners' right to freedom of speech under the First Amendment (Initial Decision and Order at 9-18, 69). The Chief ALJ reviewed the Almond Order using the three-part test in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), a test used by the Supreme Court of the United States to determine the constitutional validity of laws which restrict commercial speech. The Court held in *Central Hudson* that "[t]he First Amendment . . . protects commercial speech from unwarranted governmental regulation[,]" *id.* at 561, and if commercial speech is neither misleading nor related to unlawful activity, restrictions on such speech must: (1) implement a substantial governmental interest; (2) directly advance that interest; and (3) be narrowly tailored to achieve the desired objective. *Id.* at 564.

The Chief ALJ, applying the *Central Hudson* test to the Almond Order, found that there was a substantial governmental interest in promoting the consumption of

almonds (Initial Decision and Order at 5),[20] but found that the Almond Order failed to directly advance the government's interest of selling more almonds and increasing returns to almond growers (Initial Decision and Order at 9-16, 18, 69) and is more extensive than necessary to advance the government interest of selling more almonds and increasing returns to almond growers (Initial Decision and Order at 16-18, 69). Based on these findings, the Chief ALJ concluded that, under the *Central Hudson* test, the Almond Order violates Petitioners' right to freedom of speech under the First Amendment; and therefore, the Almond Order is not in accordance with law (Initial Decision and Order at 18, 69).

However, the *Central Hudson* test is not applicable to this proceeding because the *Central Hudson* test is used to determine whether restrictions on commercial speech pass constitutional muster and neither the AMAA nor the Almond

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20. The Chief ALJ does not directly state that he found that there was a substantial governmental interest in promoting the consumption of almonds. However, the Chief ALJ does state that the United States Court of Appeals for the Ninth Circuit, "the circuit which will eventually review this case[,] has already addressed the constitutional issue that is the sole subject of the petitions" and that the "legal conclusions of the Ninth Circuit on this issue are controlling." (Initial Decision and Order at 3.) Further, the Chief ALJ, citing *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993), states that "USDA was held to have satisfied its . . . burden of proving a substantial government interest in promoting the consumption of almonds: 'We agree that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest.' 14 F.3d at 437." (Initial Decision and Order at 5.)

Order nor the Almond Board prohibit or restrict commercial speech. The AMAA and the Almond Order do, however, compel Petitioners to fund an almond promotion program.

In *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), decided on June 25, 1997, more than 2 years after the Chief ALJ issued the Initial Decision and Order, the Supreme Court of the United States specifically rejected the use of the *Central Hudson* test to determine the validity under the First Amendment of two marketing orders[21] issued pursuant to the AMAA. Instead, the Supreme Court held in *Wileman Bros.* that provisions of the two AMAA marketing orders compelling handlers of California tree fruit to fund generic advertising programs neither abridge the handlers' First Amendment rights nor implicate the First Amendment.

The Court in *Wileman Bros.* stressed the importance of the statutory context in which the First Amendment issue arises as follows:

> In answering [the] question [whether being compelled to fund advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve] we stress the importance of the statutory context in which

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21. The two marketing orders at issue in *Wileman Bros.* are: Marketing Order 916, which regulates nectarines grown in California (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), which originally regulated peaches, pears, and plums grown in California. The plum portion of Marketing Order 917 was terminated in 1991 (56 Fed. Reg. 46,368).

> it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.

Glickman v. Wileman Bros. & Elliott, Inc., supra, 117 S. Ct. at 2138. The Almond Order, like the California tree fruit orders at issue in *Wileman Bros.*, is a comprehensive regulatory scheme established under the AMAA. The Almond Order contains provisions for volume and quality control and requires handlers to keep records and make periodic reports. Like the California tree fruit orders at issue in *Wileman Bros.*, the Almond Order contains a research, promotion, and generic advertising scheme. Handlers subject to the Almond Order that are compelled to fund the generic advertising do so as a part of a broader collective enterprise in which their freedom to act independently is constrained by the regulatory scheme. Thus, there is no material

difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding; and I, therefore, find that *Wileman Bros.* is dispositive of Petitioners' First Amendment challenge to the Almond Order in this proceeding.[22]

However, the Supreme Court did not limit its holding in *Wileman Bros.* to marketing orders issued under the AMAA. Instead, the Court held that three characteristics of the regulatory scheme at issue in *Wileman Bros.* distinguish it from laws that the Court found to abridge the freedom of speech protected by the First Amendment, as follows: (1) the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience; (2) the marketing orders do not compel any person to engage in any actual or symbolic speech; and (3) the marketing orders do not compel producers to endorse or finance any political or ideological views.

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22. Moreover, on June 27, 1997, the Supreme Court of the United States vacated the judgment of the United States Court of Appeals for the Ninth Circuit in *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995), and remanded the case for further consideration in light of *Wileman Bros. Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). In *Cal-Almond*, the United States Court of Appeals for the Ninth Circuit held that the generic advertising program under the very same Almond Order that is the subject of this proceeding (7 C.F.R. pt. 981) violated handlers' First Amendments rights. On September 4, 1997, the United States Court of Appeals for the Ninth Circuit remanded *Cal-Almond* "to the district court with instruction to dismiss Cal-Almond's First Amendment claim." (Respondent's Memorandum in Support of Motion for Immediate Decision, Attachment C.)

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An examination of the Almond Order reveals that the Almond Order has the very same three characteristics which the Court found dispositive of the First Amendment issue in *Glickman v. Wileman Bros. & Elliott, Inc., supra*. First, Petitioners are not prohibited or restrained by the AMAA, the Almond Order, or the Almond Board from promoting or advertising their own almonds or from communicating any other message to any audience. Section 501(b)(4)-(5) of the Federal Agriculture Improvement and Reform Act of 1996 provides that the AMAA was neither designed nor intended to prohibit or restrict, and the Almond Order established pursuant to the AMAA does not prohibit or restrict, any individual advertising or promotion or replace the individual advertising or promotion efforts of producers or processors (110 Stat. 1030). This factor distinguishes the AMAA and the Almond Order from cases in which the Supreme Court has found that restrictions on commercial speech violate the right to freedom of speech.[23]

While the requirement that Petitioners fund generic advertising may reduce the amount of money available to

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23. *See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (holding that a state statute which bans price advertising for alcoholic beverages abridges speech in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that a New York Public Service Commission ban on advertising by an electric utility to promote the use of electricity violates the First and Fourteenth Amendments); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that a state statute which bans the advertising of prescription drug prices violates the First and Fourteenth Amendments).

Petitioners to conduct their own advertising or communicate other messages, this incidental effect of the AMAA and the Almond Order does not amount to a restriction on speech.[24] Further, unlike the California tree fruit orders at issue in *Wileman Bros.*, the Almond Order ameliorates this incidental effect by providing that almond handlers may reduce the Almond Board's advertising assessment by engaging in and receiving credit for their own promotional activities.[25]

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24. *See generally Glickman v. Wileman Bros. & Elliott, Inc.*, *supra*, 117 S. Ct. at 2138-39 (stating that the First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget and the fact that an economic regulation may indirectly lead to a reduction in an individual advertising budget does not itself amount to a restriction on speech); *In re Jerry Goetz*, 56 Agric. Dec. __, slip op. at 33 (Nov. 3, 1997) (stating that even if the requirements of the Beef Promotion and Research Act of 1985 and the Beef Promotion and Research Order do reduce the resources available to the respondent to engage in his own speech, this incidental effect of the Beef Promotion and Research Act of 1985 and the Beef Promotion and Research Order does not amount to a restriction on speech); *In re Donald B. Mills, Inc.*, 56 Agric. Dec. __, slip op. at 45 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997) (stating that while the requirement that petitioner fund generic advertising may reduce the amount of money available to petitioner to conduct its own advertising or communicate other messages, this incidental effect of the Mushroom Promotion, Research, and Consumer Information Act of 1990 and the Mushroom Promotion, Research, and Consumer Information Order does not amount to a restriction on speech).

25. See the "credit-back" program instituted beginning in the 1993-94 crop year (7 C.F.R. § 981.441 (1994)) and the "creditable"

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Second, Petitioners are not compelled to speak by either the AMAA or the Almond Order. This fact distinguishes the AMAA and the Almond Order from cases in which the Supreme Court has found that compelled speech violates the right to freedom of speech or association.[26] While Petitioners

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program in place prior to the 1993-94 crop year (7 C.F.R. § 981.441 (1993)). Neither the credit-back program nor the creditable program requires handlers to advertise, but rather both programs give the handler the option to advertise and receive credit for promotional expenditures as provided in the Almond Order. Further, while both the credit-back and creditable programs limit the type of promotion for which a handler may receive credit, neither the credit-back program nor the creditable program prohibits or restricts a handler from promoting or advertising almonds in any other way or from communicating any other message to any audience.

26. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that requiring private citizens who organize a parade to include a group which imparts a message that organizers do not wish to convey violates the First Amendment); *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) (holding that a state statute requiring professional fund raisers to disclose to potential donors the percentage of charitable contributions collected that were turned over to the charity mandates speech in violation of the First Amendment); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state statute requiring an individual to display an ideological message on his or her private property violates the First Amendment); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that action of a state making it compulsory for children in public schools to salute the flag and pledge allegiance to the flag and the republic for which the flag stands violates the First and Fourteenth Amendments).

are compelled under the AMAA and the Almond Order to fund promotion of almonds, this requirement is not a requirement that Petitioners speak. Petitioners are not publicly identified or publicly associated with the Almond Board's promotion program, and Petitioners are not required to respond to the Almond Board's promotion program.

Third, the Almond Board's almond promotion program has no political or ideological content, and Petitioners are not compelled by the AMAA or the Almond Order to endorse or finance any political or ideological views. Section 501(b)(8) of the Federal Agriculture Improvement and Reform Act specifically provides that the AMAA establishes promotion programs to produce "nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding . . . markets" (110 Stat. 1031). This fact distinguishes the AMAA and the Almond Order from cases in which the Supreme Court has found that required financing of political or ideological speech violates the right to freedom of speech.[27]

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27. *See Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that a state bar's use of compulsory dues paid by attorneys to finance political or ideological activities with which the attorneys disagree violates the attorneys' First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that a union's use of compulsory service charges paid by public school teachers to finance ideological causes with which the teachers disagree violates the teachers' First Amendment right to freedom of speech when such expenditures are not germane to the union's duties as a collective bargaining representative).

Further, the record reveals that Petitioners are not concerned with the political or ideological content of the Almond Board's advertisements, but rather view the Almond Board's advertising program as a waste of money and not well suited to the promotion of their respective products. Petitioners believe that, if left to their own devices, they could better promote their respective products. Petitioners' objections to the Almond Board's advertising program do not rest upon political or ideological disagreement with the content of the Almond Board's message, and the mere fact that Petitioners believe that their money is not well spent does not mean that they have a First Amendment complaint.[28]

I find that *Wileman Bros.* is dispositive of the First Amendment issue in this proceeding. The differences between the regulatory scheme in the marketing orders at issue in *Wileman Bros.* and the regulatory scheme at issue in this proceeding are not relevant to Petitioners' First Amendment challenge to the AMAA and the Almond Order. Thus, the requirement under the AMAA and the Almond Order that Petitioners fund the promotion of almonds does not violate Petitioners' rights guaranteed under the First Amendment to the Constitution of the United States, and Petitioners' rights under the First Amendment are not even implicated by the AMAA or the Almond Order.

Just as the Supreme Court found with respect to the California tree fruit orders under review in *Wileman Bros.*, the Almond Order is a species of economic regulation that

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28. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2138 (1997); *Ellis v. Railway Clerks*, 466 U.S. 435, 456 (1984).

should enjoy a strong presumption of validity, and the mere fact that Petitioners do not wish to fund generic advertising of their product "is not a sufficient reason for overriding the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial."

Petitioners contend in Petitioners' Appeal Petition to the Judicial Officer from the Administrative Law Judge's Decision Pursuant to 7 C.F.R. § 900.65 [hereinafter Petitioners' Appeal Petition] that they are entitled to a refund of assessments paid as follows:

> Petitioners agree entirely with the decision reached by Chief Administrative Law Judge Palmer that the [Almond] Board's promotion and advertising program from 1986-87 through the 1994-95 crop years were unconstitutional and therefore not in accordance with law. However, Petitioners appeal this decision for the sole reason that the decision does not order a refund of assessments, and never addressed the issue of a refund. . . .
>
> . . . .
>
> Petitioners herein allege that they are entitled to the following relief, based upon Chief Administrative Law Judge Palmer's decision:
>
> A. An order that Petitioners are entitled to a refund from USDA of all their creditable advertising assessments and credit-back

advertising assessments imposed by USDA for the crop years 1986-87 through the 1994-95 crop years;

B. An order ordering a refund from USDA of that portion of the administrative assessments used by the Almond Board for the Board's generic promotion and advertising program for the crop years 1986-87 through 1994-95 crop years;

C. That the refund of assessments listed in the two preceding paragraphs are required by the Ninth Circuit Court of Appeals' decisions in *Cal-Almond, Inc., et al v. USDA*, 14 F.3d 429 (9th Cir. 1993), and upon remand, *Cal-Almond, Inc., et al v. USDA*, District Court decision of September 19, 1994; and *Wileman Bros. & Elliott, Inc., et al v. Espy*, 95 Daily Journal D.A.R. 8411;

D. In all other respects, [the] Chief Administrative Law Judge's decision should be affirmed.

As an initial matter, Petitioners' reliance on the Ninth Circuit decisions in *Cal-Almond* and *Wileman Bros.* is misplaced; the Supreme Court of the United States reversed the Ninth Circuit's decision in *Wileman Bros.*[29] and vacated the Ninth Circuit's decision in *Cal-Almond.*[30] Further, the

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29. *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

30. *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997).

Supreme Court has remanded *Cal-Almond* to the United States Court of Appeals for the Ninth Circuit for further consideration in light of the Supreme Court's decision in *Wileman Bros.* The Ninth Circuit, in turn, has remanded *Cal-Almond* "to the district court with instruction to dismiss Cal-Almond's First Amendment claim." (Respondent's Memorandum in Support of Motion for Immediate Decision, Attachment C.) Moreover, because I conclude in this Decision and Order that neither the AMAA nor the Almond Order violates Petitioners' rights guaranteed under the First Amendment of the Constitution of the United States, the issue of a refund of assessments is moot.

Respondent states that it "renews its motion to exclude the entire testimony of petitioner Monte Cristo." (Respondent's Proposed Findings of Fact and Conclusions of Law; Appeal of the ALJ's Findings of Fact and Conclusions of Law at 26). Petitioner Monte Cristo Packing Company did not testify during the hearing, and it is difficult to discern what "testimony" Respondent requests be excluded; therefore, Respondent's renewed motion is denied.[31]

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31. I do note that during the hearing the Chief ALJ denied Respondent's motion to exclude MC 1-22 (Tr. 2434-39). However, I do not speculate as to the nature of Respondent's renewed motion "to exclude the entire testimony of petitioner Monte Cristo." (Respondent's Proposed Findings of Fact and Conclusions of Law; Appeal of the ALJ's Findings of Fact and Conclusions of Law at 26.)

Appendix D

III. Conclusions of Law

Neither the AMAA nor the Almond Order violates Petitioners' rights under the First Amendment to the Constitution of the United States.

For the foregoing reasons, the following Order should be issued.

IV. Order

The relief requested by Petitioners is denied and the Petitions are dismissed.

Done at Washington, D.C.
December 24, 1997

s/ William G. Jenson
William G. Jenson
Judicial Officer

APPENDIX E — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE DATED JUNE 15, 1995

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

94 AMA Docket No. F&V 981-1

In re:

Cal-Almond, Inc., Gold Hills Nut Company, Inc., and Frazier Nut Farms, Inc.,

Petitioners

AND

94 AMA Docket No. F&V 981-3

In re:

Del Rio Nut Company and Monte Vista Farming Company,

Petitioners

AND

94 AMA Docket No. F&V 981-4

In re:

Bal Nut, Inc., Carlson Farms, Central Valley Grower Packing, Hocker Nut Farm, Jardine Organic Ranch, and Rotteveel Orchards,

Petitioners

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AND

94 AMA Docket No. F&V 981-5

In re:

Treehouse Farms, Inc.,

Petitioners

AND

94 AMA Docket No. F&V 981-7

In re:

Theron Shamgochian, Inc. dba Monte Cristo Packing Company, formerly known as Monte Cristo Packing Company and Theron Shamgochian Ranches, Inc. dba Monte Cristo Packing Company but known always to the Almond Board for the subject crop years as Monte Cristo Packing Company; Beard's Quality Nuf Company, a sole proprietorship; and Amaretto Orchards, a California general partnership,

Petitioners

Decision and Order

The Purpose and Nature of This Proceeding

Cal-Almond, Inc. v. United States Department of Agriculture, 14 F.3d 429 (9th Cir. 1993), ("*Cal-Almond I*")

held that the California Almond Marketing Order's Promotion Program violated the First Amendment rights of almond handlers. The parties agree that the decision in *Cal-Almond I* is conclusive as to assessments charged Cal-Almond and the other petitioners who were parties in that case for marketing years 1980-81 through 1991-92. Cal-Almond, Gold Hills and Frazier seek to similarly have the assessments declared unlawful which were charged them for advertising and other forms of promotional activity for subsequent marketing years. The petitioners who were not parties in the *Cal-Almond I* case seek recovery of all the assessments they paid under the Almond Order for advertising and promotion for every marketing year since 1986-87.[1]

During a prehearing teleconference conducted on November 8, 1994, I denied a motion to apply the doctrine of non-party offensive collateral estoppel against respondent, USDA, to preclude its presentation of evidence. This ruling was based on *United States v. Mendoza*, 464 U.S. 154, 158 (1984), which held that "nonmutal offensive collateral estoppel is not to be extended to the United States."

During that teleconference, I also denied respondent's motion to apply the doctrine of laches against those petitioners who awaited the Ninth Circuit's decision before asserting their claims in respect to the 1986-87 through 1992-93 marketing years. This ruling was based on the fact

1. Theron Shamgochian and the other petitioners in 91 AMA Docket No. F&V 981-7, requested refunds back to the 1980-81 marketing year, but proposed conclusions filed by their attorney start their claim with the 1986-87 crop year.

that an administrative law judge does not have the inherent powers of courts of law an equity and in the absence of statutory or regulatory authority may not bar claims for undue delay in their filing. *See In re Sequioa Orange Co., Inc.*, 51 Agric. Dec. 123, 127-129 (1992).[2]

Oral hearings were conducted on November 14, 1994 through November 17, 1994, in Fresno, California and on December 13, 1994 through December 16, 1994, in Los Angeles, California. An evidentiary record was developed consisting of 2,560 pages of transcript and approximately 300 exhibits. Forty-three witnesses testified.

The purpose of the hearing requires explanation. My functions would normally be wholly defined by 7 U.S.C. § 608 c (15)(A) which operates under pertinent case law to require a handler challenging an obligation under a marketing order to first seek a ruling from the Secretary that it is not in accordance with law. Only after exhausting this administrative remedy may a handle take the challenge to court. *See Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1197 (9th Cir. 1990). This is true even when, as here, a question of constitution law is at issue. *See United States v. Ruzicka*, 329 U.S. 287, 294 (1946).

On the other hand, the circuit which will eventually review this case has already addresses the constitutional issue

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2. This does not necessarily mean that a reviewing court will not exercise its inherent powers and bar those petitioners who delayed seeking refunds of assessments to await the *Cal-Almond I* decision. *See Gruca v. United States Steel Corp.*, 495 F.2d 1252, 1259 (3d Cir. 1974), which held delay for that reason to be inexcusable.

that is the sole subject of the petitions. Although respondent was allowed to present new evidence in this proceeding, the legal conclusions of the Ninth Circuit on this issue are controlling. The Department of Agriculture does not pursue a policy of non-acquiescence in cases subject to review in a circuit which has already addressed a controlling legal issue. *In re Sparkman*, 50 Agric. Dec. 602, 609 (1991); *In re Stamper*, 41 Agric. Dec. 1935, 1949 (1982).

In arriving at its decision that handlers' First Amendment rights of free speech had been violated, the Ninth Circuit reviewed the operation of the California Almond Marketing Order and reached a number of legal conclusions which must be considered binding in that circuit and thereby binding in this proceeding.

Firstly, it decided that:

> . . . while the Order, clearly does not compel appellants to advertise, it does compel them to expend a certain sum of money every year on either assessments (for generic almond promotion) or creditable advertising. Since either alternative burdens appellants' First Amendment rights, these rights are clearly implicated by a program containing both.

14 F.3d at 434. This holding is consistent with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119, 1132-33 (3d Cir. 1989), even though *Frame* eventually went on to uphold the constitutionality of the Beef Promotion Act. As in *Frame*, the *Cal-Almond I* court next applied the test

specified in *Central Hudson Gas and Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980), for evaluating the constitutionality of commercial speech regulation.

This test and the Department's evidentiary burden under it, were summarized in *Cal-Almond I*:

> . . . for the almond marketing program to be constitutional, (a) the asserted government interest behind it must be 'substantial,' (b) the program must 'directly advance' that interest, and (c) the program must not be more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351. USDA has the burden of justifying the program by presenting evidence sufficient to satisfy these requirements. *Edenfield v. Fane*, __ U.S. __, __, 113 S. Ct. 1792, 1800, 123 L.Ed.2d 543 (1993).

14 F.3d at 437. USDA was held to have satisfied its first burden of proving a substantial government interest in promoting the consumption of almonds: "We agree that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest." 14 F.3d at 437.

However, USDA was held to have failed to have met its burden of showing: (1) that the almond advertising and promotion program "directly advance" the government's stated goals of selling more almonds and increasing returns to producers, and (2) that the implementing regulations were

not more extensive than necessary. 14 F.3d at 437-440. In so doing, the Court pointed to the dearth of evidentiary proof by USDA that the program met both of these preconditions for government regulation of commercial speech.

Additionally, *Cal-Almond I* held that the program infringes on the First Amendment rights of handlers to free association which is subject to evaluation under an even more stringent standard than the *Central Hudson* test. Because the court held the Almond Order's Promotion Program was unconstitutional under the less stringent *Central Hudson* standard, it found no need to apply the more stringent freedom of association test set forth in *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). *See Cal-Almond I*, 14 F.3d at 436. But as petitioners point out, the Almond Order's Promotion Program must also pass constitutional muster under the applicable freedom of association standard.

My principal role, therefore, is to act as a fact finder and evaluate the evidence presented by USDA, in the present proceedings in satisfaction of these First Amendment standards as the Ninth Circuit has applied them to the California Almond Marketing Order.

In addition to the petitioners and the Department of Agriculture, Blue Diamond Growers, Inc. (a grower owned cooperative that markets almonds for its members) and Paramount Farms, Inc. (a handler affiliated with a grower with a similar name whose crop it markets) have been allowed to file briefs. Briefing was completed on May 9, 1995.

Appendix E

The Almond Promotion Program

The Almond Order's Promotion Program differs from the Beef Promotion and Research Order that was upheld as constitutional in *Frame*.

The Beef Promotion and Research Order exclusively employs mandatory assessments collected by handlers from growers to fund generic advertising and promotion. This is true of virtually every farmer/grower "self-help" program Congress has enacted to assist in the sale of agricultural commodities and enhance grower returns. This form of governmental intervention is practiced to overcome the "free rider" problem that hinders effective generic advertising when financed on a voluntary basis. *Frame* found this intervention justified by a national interest in "preventing further decay of an already deteriorating beef industry. . . . (because a) continuation of this trend would endanger not only the country's meat supply but the entire economy." *Frame*, 885 F.2d at 1134.

Against this background the *Frame* court held:

> In conclusion, although we find that the Beef Promotion Act implicates the first amendment rights of those obligated to participate, we hold that the government has enacted this legislation in furtherance of an ideologically neutral compelling state interest, and has drafted the act in a way that infringes on the contributors' rights no more than necessary to achieve the stated goal.

885 F.2d at 1137. The Almond Order's Promotion Program also seeks to promote the sale of an agricultural commodity. But that is its only real similarity to the Beef Promotion Order.

The almond industry is thriving. Per capita consumption of almonds in America has grown 38% since 1986-87. Acreages allocated to almond production have increased annually. The size of the industry in terms of the numbers of growers and handlers, has likewise increased. This has been mainly fueled by increases in export sales and sales of almonds to domestic manufacturers for ingredients in candy, cereal and other products.

The major almond handler, Blue Diamond, which supplies approximately 90% of the retail market, has regularly engaged in branded advertising of its almonds and spent many times more on advertising than any of its competitors or the Almond Board. Blue Diamond would have advertised its almonds even in the absence of the Almond Order's Promotion Program.

Generic advertising and promotion of almonds has not been, until recently at least, the major purpose of the program. The generic advertising and promotion which the Almond Board conducted through the 1992-93 market year was insubstantial and ineffective. Ostensibly, every handler was charged a creditable advertising assessment each marketing year of usually 2 1/2 cents per kernel pound of almonds handled. The handlers, however, were encouraged to conduct branded advertising and promotions for which they received credit in avoidance of the assessments. Those who did pay

rather than advertise, saw part of their payments used to reduce everyone's administrative assessments for the Board's general operating expenses.

After the 1992-93 marketing year, "creditable advertising assessments" were replaced by a "credit-back" program which does generate larger sums for generic advertising and promotion. An effective generic promotion program is now conceivable, but still unimplemented. Even so, the stimulation of branded advertising and promotion continues to be an essential function of the Almond Order's Promotion Program.

The asserted governmental goal is to enhance grower returns through increased sales and higher farm prices. The essential purpose of branded advertising, however, is to increase the advertiser's share of the market. Some branded advertising programs, such as Blue Diamond's "Can-A-Week" campaign, may also increase the overall demand for the product advertised. But their real purpose is to convince prospective buyers to buy the brand advertised. When buyers are responsive, the advertiser receives the desired benefit of greater profits, which are not, except in a most problematic sense, shared with competitors or non-aligned growers. Thus, the government interest of selling more almonds and enhancing producer returns would seem only incidentally rather than "directly" advanced by a program that actively encourages the use of branded advertising.

This function of the Almond Order's Promotion Program would appear by itself to preclude the program from meeting the Supreme Court's test for permissible government

regulation of commercial speech. However, in concluding that the Promotion Program did not directly advance the government interest asserted, the *Cal-Almond I* court stated instead:

> In sum, the record indicates that the regulations do not stimulate additional or more effective advertising from Blue Diamond. Appellants have presented evidence showing that the regulations hinder their own marketing efforts, and USDA has presented no evidence that the regulations assist the efforts of other handlers. Therefore, we hold that the regulations do not "directly advance" the government's asserted interest in increased almond sales and are therefore an unconstitutional restriction on appellant's First Amendment rights."

14 F.3d at 439. *Cal-Almond I* went on to further conclude that the creditable advertising regulations were also "more extensive than necessary" and, for that reason, contrary to the final requirement of the *Central Hudson* test which was explained as a "reasonable fit" test in *Board of Trustees of State Univ. v. Fox*, 492 U.S. 469, 480 (1989):

> It is true that the fit between means and ends need not be perfect, but there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as appellants, who sell primarily

> to ingredient manufacturers. This court has interpreted *Fox* as holding that "restrictions which disregard far less restrictive and more precise means are not narrowly tailored." *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991). The creditable advertising regulations disregard such means, and therefore are more extensive than necessary to serve the interest of increasing almond sales.

14 F.3d at 440.

The "Directly Advance" Test and the Present Record

Respondent's brief first argues that the Ninth Circuit applied the "directly advance" test more restrictively than intended by the Supreme Court and failed to accord sufficient deference to legislative judgment.

However, the Supreme Court recently addressed this test in *Rubin v. Coors Brewing Co.*, 63 U.S.L.W. 4319 (U.S. Apr. 19, 1995), and specifically rejected the argument advanced by respondent that under *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), greater deference should be shown legislative judgment in regulating commercial speech: "Neither, *Edge Broadcasting* nor *Posadas* compels us to craft an exception to the *Central Hudson* standard, for in both of those cases we applied the *Central Hudson* analysis." 63 U.S.L.W. at 4321 n.2.

The Supreme Court explained anew the application of the "directly advances" part of its test for determining whether a regulation of commercial speech survives First Amendment scrutiny:

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> The remaining *Central Hudson* factors require that a valid restriction on commercial speech directly advance the government interest and be no more extensive than necessary to serve that interest. We have said that '[t]he last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislative's ends and the means chosen to accomplish those ends' *Posadas*, *supra*, at 341 . . .
>
> Just two terms ago, in *Edenfield v. Fane*, 507 U.S. (1993), we had occasion to explain the *Central Hudson* factor concerning whether the regulation of commercial speech 'directly advances the governmental interest asserted.' In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way.' *Id.*, at __ (slip op., at 5). That burden 'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' *Id.*, at __ (slip op., at 9).

63 U.S.L.W. at 4322. Therefore, respondent errs in arguing that *Cal-Almond I* applied the Supreme Court standard too rigidly.

Respondent next asserts that in applying the "directly advance" test, the Ninth Circuit incorrectly concentrated on

the effects the Almond Promotion Program has on handlers, and ignored its benefits to growers.

If there is any confusion as to whom the Almond Order's Promotion Program is designed to assist, the confusion is caused by the program itself. Unlike the majority of other promotion programs that charge assessments to growers which handlers are merely required to collect, the Almond Order charges the assessments to the handlers. Handlers are then free to negotiate deductions for the assessments from the prices they pay growers. Some do; some do not. But irrespective of whether the grower, handler or consumer is the one who ultimately pays the assessments, the Almond Board has only collected them from those handlers who did not engage in branded advertising or other forms of approved brand related promotion. Comparison of the small amount of money actually collected and used by the Board for generic advertising and promotion out of the relatively huge amounts assessed for it, makes it abundantly clear that the essential purpose of the program was not to engage in generic advertising and promotion, but rather to induce expenditures by all handlers equivalent, on a per kernel pound basis, to those expended by Blue Diamond for its brand advertising.[3]

The testimony by Blue Diamond's representative, Algernon Greenlee, shows that Blue Diamond's concern is that if it alone engaged in advertising and promotion, its

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3. During the 1987-88 through the 1990-91 marketing years, the total expenditure by the Almond Board for advertising, promotion and public relations ranged between $840,000 to $1,400,000 per year, whereas during the same time period, Blue Diamond spent $8,000,000 to $14,200,000 per year on advertising.

competitors could use their lower costs to price their products below Blue Diamond and enjoy a competitive advantage. This point is reiterated at page 20 of Blue Diamond's brief. In fact, Blue Diamond regulates its spending for advertising to assure that it spends no more than the credit it receives against the advertising assessment, and thereby spends no more per pound than the amount its competitors are compelled to spend under the Order. As was found in *Cal-Almond I*, the Almond Order's Promotion Program has not stimulated additional or more effective advertising from Blue Diamond. What it has done is to require Blue Diamond's competitors to make equivalent expenditures. These competitors include the petitioners who have again testified as was done in *Cal-Almond I*, that they could more effectively market their product through methods other than those authorized as "creditable" methods for avoiding payment of the advertising assessments. Moreover, the type and level of the Board's generic advertising and promotion did not target the markets where petitioners sell their products and was of scant assistance to them.

Respondent has urged, however, that competing handlers benefitted whenever Blue Diamond's advertising increased its sales of almonds because that reduced the amount of almonds it had available to sell in other outlets. Therefore, respondent continues, Blue Diamond had less almonds to sell overseas and its competitors could increase their prices in accordance with the economic law of "one price" in the export market where almond demand has been inelastic. This kind of benefit is simply too remote to meet the *Central Hudson* standard. But not only did the Promotion Program fail to materially aid any of the petitioning handlers as it did

Blue Diamond, it did not "directly advance" the interests of growers.

Even though Blue Diamond's "Can-A-Week" campaign may have incidentally increased consumer awareness of almonds, the same cannot be said of the "creditable" advertising and promotion by its competitor's which the Promotion Program induced.

Those who could find no valid business reason for engaging in branded advertising were given credit for buying 1/2 ounce "charity packs" of almonds from the Almond Board for distribution to schools and churches. (Ex. AO1, par. 2; Tr. 406, Tr. 593, Tr. 605) Some owning little country stores received credit for advertising the stores. (Ex. HNF6, par. 2) Credit was given for billboards located in California. (Tr. 288-289) Credit was given to an almond handler for an automobile racing promotion. (Tr. 41) Credit was given for advertising in a program by "The Beautiful Ladies of Oil Wrestling" who wrestled while coated with almond oil. (Tr. 146-147) Handlers received credit for newspaper and radio brand advertisements which were of poor quality and limited success in selling almonds. (Tr. 272)

It stretches credulity to the breaking point to believe that these forms of advertising and promotion expanded the overall market for almonds or otherwise enhanced the prices growers received for their almonds.

The only branded advertising that respondent can argue was of benefit to growers was Blue Diamond's. But Blue Diamond would have advertised even without the Almond Order. It controlled 90% of the retail market and its

"Can-A-Week" campaign was directed to that market. If American consumers purchased more almonds at retail stores as a result of the campaign, Blue Diamond was the obvious, prime beneficiary. When the Almond Board contracted with Dr. Jason Christian of the Department of Agricultural Economics at the University of California-Davis, to research the impact of advertising on almond demand, the only data on advertising expenditures given him was Blue Diamond's.

Dr. Christian's study found a direct correlation between the total volume of almonds sold and the amount Blue Diamond spent each year to advertise. He concluded that the more Blue Diamond advertised, the more demand increased. The problem with this conclusion is akin to Sherlock Holmes' statement about a stick found lying on the ground being used as evidence. Looked at from one end it points in one direction; walk around it and it points in the opposite direction. Inasmuch as Blue Diamond correlated its advertising budget to the amount of its annual advertising assessment which is computed on a per pound handled basis, the amount Blue Diamond spent on advertising was obviously greater in the years when the higher volumes were sold. In other words, it may well be that higher sales volumes caused higher advertising expenditures, and not the other way around.[4]

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4. This point was made by Professor Michael K. Wohlgenant, Department of Agricultural and Resource Economics at North Carolina State University, in his prepared direct testimony which critiqued Dr. Christian's study. (J. Pet. #2, page 7, par. 6) Although Dr. Christian and his colleague, Professor Sexton, returned to the stand to refute Professor Wohlgenant's critical comments, neither addressed this observation.

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Moreover, Blue Diamond's "Can-A-Week" campaign was conducted wholly within the United States and was directed to the retail market. But the increases in sales of almonds in the past ten years have been principally due to increased exports and increased purchases by domestic manufacturers for ingredient use. In fact the share of almonds going to the domestic retail market has declined. As Professor Scott Davis of the Graduate School of Management, University of California-Davis, explained (J. Pet. #1, page 8):

> Based on the advertising and promotional material I have observed, it seems unlikely that advertising of any sort stimulates the demand by ingredients buyers. The advertising that was conducted during the time period studied by Christian seems primarily targeted toward household consumption of almonds as a snack (e.g. the "Can a Week" campaign) or as ingredients in recipes. Thus, if advertising has been the primary force in stimulating the demand for almonds, one would expect substantial growth in the demand by the household segment and limited growth by the ingredients segment. As a result, if the advertising is effective, we would expect an increase in the share of the market which is attributable to household consumption relative to the share attributable to demand by ingredients buyers . . . . It appears that the demand by the ingredients buyers has increased more rapidly than the demand for direct household use.

But again, even if Blue Diamond's advertising was effective in selling almonds and enhancing grower returns, the assessments charged handlers did not make that happen. Blue Diamond would have advertised its brand anyway. The branded advertising and promotion by other handlers was virtually useless. Those dollars which did end up being spent on generic advertising and promotion were too few and too poorly spent to be effective. Several witnesses called by USDA testified that, in 1991, the Board's promotional activities had not been successful in promoting almonds. (Greenlee, Tr. at 356-57; Campos, Tr. at 611; Phinney, Tr. at 2240) A study commissioned by the Almond Board showed that when consumers were asked to identify the spokesperson, for almonds, only 3% correctly identified Greg LeMond and 5% mistakenly identified Sandi Duncan. (Rx 154 attachment B page 14). Ms. Gullickson, the Board's new public relations person, testified that her firm's research showed that, in 1993, people had a "nambi-pambi kind of reaction" to almonds. (Tr. at 1211) Even respondent admits, at page 50 of its brief, that prior to 1992, ". . . one cannot expect to discover a very powerful generic campaign for that time period, or very measurable effects from that generic promotion."

Under the new credit-back provisions there should now be sufficient money to fund a generic program at an effective level. To that end, the Board has prepared a tentative advertising campaign featuring monks who cannot control their appetite for almonds. Whether this contemplated campaign will enhance the image of almonds and benefit the industry, is untested and uncertain. Respondent admits at page 63 of its brief that it "cannot be expected to produce

a measurable attributable increase in almond sales at such an early stage. . . . (but it) might be expected to ultimately increase the price and/or sales of almonds." Although Ms. Gullickson's firm has been trying to improve consumer reaction to almonds, she had no evidence that her efforts have been successful. (Tr. at 1248, 1284) None of the Board's other advertising or public relations people presented any evidence that any of the Board's recent efforts have been successful in stimulating the demand for almonds. (Lundeen, Tr. at 1349, Buxton, Tr. at 1620, 1654-55)

A similar lack of evidence of the effectiveness of proposed generic advertising recently caused the United States District Court for the Eastern District of California to grant a preliminary injunction when it applied *Cal-Almond I* to the California State program for advertising apples. *See Bidart Bros. v. California Apple Comm'n*, No. CV-F-94-6018-OWW, Slip op. at 14 (D.C. Cal. Dec. 1, 1994).

In sum, under *Cal-Almond I*, USDA was required to produce evidence showing that the Almond Order's Promotion Program "directly advances" the asserted government interest, and this record lacks that evidence.

The "No More Extensive Than Necessary" Test and the Present Record

The final test under *Central Hudson* which the Almond Order's Promotion Program must meet, is the "no more extensive than necessary" test.

This test was explained in *Rubin*, 63 U.S.L.W. at 4323, as requiring government regulation of speech to be "sufficiently tailored to its goal" else there is not a sufficient "fit". The availability of options, "all of which could advance the Government's asserted interest in a manner less intrusive to . . . (a regulated person's) First Amendment rights, indicates that the . . . (government action) is more extensive than necessary". *See Rubin*, 63 U.S.L.W. at 4323-4324.

Cal-Almond I decided that the creditable advertising regulations for determining which forms of advertising and promotion were eligible for credit were too restrictive and failed the "no more extensive than necessary" test, justification for the restrictions which denied credit for ads promoting more then two complementary branded products; ads promoting a product that also has competing nuts; or ads promoting retail stores not owned by handlers.

The present record also fails to justify such restrictions which were in force under the creditable advertising program from 1986 through 1992.

Under the new credit-back program, such restrictions have been removed. But petitioners contend they are improperly being denied credit for personal selling and their travel expenses to develop new overseas markets.[5]

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5. Some petitioners also urged they should be given credit for their investments in plant equipment and for lavish client entertainment. Inasmuch as investment in plant equipment is a capital outlay incurred for many reasons other then increasing overall demand for almonds, it should neither be credited nor should the Promotion Plan be faulted for its denial. Client entertainment which

(Cont'd)

The credible evidence of record convinces me that the petitioners do not need the Promotion Program to cause them to engage in either activity. Just as Blue Diamond would advertise its almonds in the absence of the Promotion Plan, so would petitioners personally sell and travel to sell their almonds. However, inasmuch as this regulatory system allows handlers credit for branded advertising and promotion because overall sales and grower returns may be increased, it is arbitrary to deny credit to handlers for personal selling which is just as likely to accomplish that result. It is also arbitrary to deny handlers credit for their overseas travel to develop new markets when this kind of travel by Almond Board officials is reimbursed out of the handlers' assessments. For these reasons, the new credit-back program also fails the "no more extensive than necessary" test.

Freedom of Association

Cal-Almond I found it unnecessary to review the record in terms of the Supreme Court's test for permissible government restriction on Freedom of Association, "because we hold the almond marketing program unconstitutional even under the less stringent *Central Hudson* standard." 14 F.3d at 436.

In this proceeding, the same situation has occurred, and further consideration of the Freedom of Association issue is again unnecessary.

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in the almond industry appears to be extremely lavish, is so completely identified with the firm that provides the entertainment that competitors should not be made to participate in its cost via "credits."

Appendix E

Disposition of the Petitions

The Almond Order's Promotion Program is determined not to be in accordance with law from 1986 through the present, in that it failed to directly advance and was more extensive than necessary to advance the government interest asserted in justification of its regulation of petitioners' commercial speech. The detailed findings of fact and conclusions in support of this disposition are as follows:

Findings of Fact

A. The Petitioners

Cal-Almond

1. Cal-Almond, Inc. is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Cal-Almond to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Cal-Almond seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Cal-Almond for the 1992-1993 marketing year and every subsequent marketing year.

2. 65% of the almonds Cal-Almond handles are sold into the export market, and 35% into the domestic market. In 1988, Cal-Almond desired to and did expand its product

lines to provide more manufactured products. Most almond handlers ship only "brown almonds" (almonds that are not manufactured), and Cal-Almond extensively increased its product lines beginning in 1988 to manufacture items that are sliced, diced and blanched. (Dryden; Ex. CA3, par. 3)

3. In 1989, approximately 50% of Cal-Almond's product was manufactured into specialty products which include blanched, sliced, diced and super premium brown almonds. In 1993-1994 Cal-Almond had increased the amount of almonds it handled to approximately thirty million pounds; approximately 80% of these almonds were manufactured into specialty products. For the 1994-1995 crop year, Cal-Almond anticipates handling approximately forty million pounds with approximately 80% of that product being manufactured into specialty products. (Dryden; Ex. CA3, par. 3)

4. It is also important to Cal-Almond to develop a reputation among buyers and customers of being able to produce its products, in a timely manner and at competitive prices, which are used in the manufacture of ice creams, cereals, bakery goods, candy bars and other confectionery items. (Dryden; Ex. CA3, par. 5)

5. Cal-Almond, at considerable expense, has so successfully developed the Cal-Almond label, that many buyers and brokers have called Cal-Almond at the urging of an end user who wants the Cal-Almond label because of its assurance of quality, timeliness of shipment and competitive price. (Dryden; Ex. CA3, par. 5)

6. In 1988, Cal-Almond sold its manufactured and specialty items, at 2-5 cents less per pound than Blue Diamond's price to customers. Today, buyers are willing to pay more for Cal-Almond's product than Blue Diamond's product. (Dryden; Ex. CA3, par. 5)

7. In 1988, Cal-Almond expanded its facilities to house newly purchased manufacturing equipment that included blanching units and all the cutting units to make the product into sliced and diced type almonds. The cost of that equipment was in excess of one million dollars, plus the cost of the propane tanks to heat the blanching water, plumbing, recycled water systems and meeting the necessary permit requirements of the county. (Dryden; Ex. CA3, par. 6)

8. Since 1988, Cal-Almond has expanded its roasting trade from pure "oil" roasting to dry roasting, because several of Cal-Almond's buyers in the bakery and candy bar trade desired dry roasted almonds; and in 1992 Cal-Almond purchased dry roasting equipment for $200,000.00. (Dryden; Ex. CA3, par. 6)

9. Cal-Almond has spent approximately $500,000.00 for additional equipment for a blanching, slicing and dicing unit to supply greater quality assurance for the customer's specifications. In the summer of 1994, Cal-Almond spent approximately $150,000.00 for the most modern dicing unit, again to meet buyer specifications and at the customer's request. (Dryden; Ex. CA3, par. 6)

10. Cal-Almond spent an additional $350,000.00 for additional cold storage warehousing so that Cal-Almond

would have the extra ability to market almonds throughout the crop year. (Dryden, Ex. CA3, par. 6)

11. Being able to market throughout the crop year allows Cal-Almond to take advantage of the highest prices during the crop year without being "forced to sell" at an earlier time or during times when the market price is lower. (Dryden; Ex. CA3, par. 6)

12. In the summer of 1994, Cal-Almond spent an additional one million dollars to improve and expand its shelling line, and an additional warehouse was being built at the time of the hearing at an expense of $150,000.00. (Dryden; Ex. CA3, par. 6)

13. In 1994, Cal-Almond also put in an LMC precleaning and cleaning line at the cost of $350,000.00, and did so because that line is the "Cadillac" of that equipment. This was done in order to meet the certification requirements of all the major domestic and export buyer specifications, which are extremely rigid. (Dryden; Ex. CA3, par. 7)

14. During tours that Dryden facilitated for visiting buyers, brokers and customers, the buyers would suggest added safeguards and extra "cleanliness" developments, stating that they would be interested in purchasing more product from Cal-Almond if it was able to add this extra equipment. Cal-Almond complied with these requests. (Dryden; Ex. CA3, par. 7)

15. As the result of a buyer request, Cal-Almond put in new flooring in one of its buildings for $75,000.00, and it

expanded the floor space of its roasting operation in order to allow the loading and unloading of almonds without the almonds facing the elements from outside. In order to meet further buyer specifications, Cal-Almond added eight more electronic sorting machines at approximately $40,000.00 per machine to increase the quality of its product. (Dryden; Ex. CA3, par. 7)

16. Cal-Almond's Quality Assurance and Production Manager, Bill Dryden has spent approximately 30% of his time with buyers and customers. He has conducted tours of Cal-Almond's facilities for buyers and customers; reviewed their rigid specifications for products, and make adjustments for purchasers in order to comply with their specifications. When these customers arrive, Cal-Almond lavishly entertains them. The customers are flown in Cal-Almond airplanes to Yosemite National Park, taken to breakfast, lunch and dinners and otherwise fully hosted at Cal-Almond's expense. (Dryden; Ex. CA3, par. 8)

17. At least once a year, Dryden and Tyler Angle, an officer of Cal-Almond and the overall manager of Cal-Almond, travel to Europe and other places in order to meet with the customers, buyers and brokers, and Cal-Almond has found that these visits are particularly valuable in promoting the Cal-Almond product and promoting almonds in general. (Dryden; Ex. CA3, par. 8)

18. Dryden is constantly on the telephone to buyers and customers to promote Cal-Almond's product, listen to the concerns of buyers and customers and provide assurances that Cal-Almond can continue to meet buyer specifications.

These are extremely important to Cal-Almond's promotion of its almonds. Cal-Almond has upgraded its computer systems at considerable expense to accommodate customer shipping and label making. (Dryden; Ex. CA3, par. 8)

19. Historically, foreign and domestic buyers of almonds would buy almonds in their brown natural state, and those buyers and customers would blanch, slice, dice and otherwise manufacture the almonds for resale or use in ingredient products. By virtue of Cal-Almond's expensive quality control efforts and equipment and its one-on-one salesmanship, Cal-Almond now provides that service which has increased Cal-Almond's profits. (Dryden; Ex. CA3, par. 9)

20. Buyers have learned as a result of Cal-Almond's special expertise, quality control and equipment, that Cal-Almond, using its own facilities and machinery, can provide those buyers and customers with a better product than the buyers and customers can with their own manufacturing equipment. It has taken a great deal of time and money to convince the buyers and customers to utilize Cal-Almond's services, but that is one of the reasons Cal-Almond has increased the tonnage that it manufactures from approximately 50% in 1989 with far less tonnage, to approximately 80% now with far more tonnage. (Dryden; Ex. CA3, par. 9)

21. None of the expenditures for equipment, product enhancement or personal selling to the customers can be approved for credit under the Board's advertising program, either under the creditable advertising program or the credit-back program. (Dryden; Ex. CA3, par. 9)

22. Dryden has worked with customers to develop new products and new manufacturing techniques in order to provide the buyers and customers with even more alternatives for almonds. (Dryden; Ex. CA3, par. 9)

23. If Cal-Almond were to assist one of its customers or buyers in advertising a product containing almonds, Cal-Almond could only receive credit on that advertisement up to the amount of the net weight of the almonds in the packages, which on most occasions is less than 10% of the net weight, even though almonds being bought as ingredient items in other products has caused the increase in the demand and consumption dramatically over the years. (Dryden; Ex. CA3, par. 10)

24. Cal-Almond believes that its buyers and customers are not interested in television, newspaper, magazine or radio advertisement; they want personal service, quality product, and new techniques for making more types and cuts of almonds and meeting the buyer's specifications. (Dryden; Ex. CA3, par. 11)

25. If the Almond Order's Promotion Program did not exist, Cal-Almond would continue to promote its product in the method and manner described in the preceding paragraphs, but would have more money for it if not required to pay advertising assessments of anywhere from $400,000.00 to $600,000.00 per year.

26. There is no method of advertising or promotion available to Cal-Almond for which Cal-Almond could receive credit under the Almond Board regulations which

Cal-Almond believes is to its benefit. (Dryden; Ex. CA3, par. 12)

27. Because of Cal-Almond's quality and reputation, many customers want Cal-Almond's product and label more than they want their own private label, and some of the buyers have Cal-Almond provide them with twenty-five and fifty pound containers bearing the customer's private label when the customer must utilize its own private label. (Dryden; Ex. CA3, par. 13)

28. There are several individuals at Cal-Almond who are constantly on the telephone with buyers and customers or meeting with buyers and customers to increase almond sales. (Dryden Ex. CA3, par. 13)

29. Under the new credit-back rules, if Cal-Almond's assessment is $400,000.00, Cal-Almond would have to spend $600,000.00 in order to receive that credit, but the available forms of advertising and promotion under the current marketing order rules are in Cal-Almond's opinion, a complete waste of money to Cal-Almond. (Dryden; Ex. CA3, par. 13)

30. For the 1992-1993 crop year, Cal-Almond's creditable advertising assessment was $366,431.83. (Ex. CA2)

31. Cal-Almond's credit-back advertising assessment for the 1993-1994 crop year was $288,440.30. (Ex. CA1)

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32. Although Cal-Almond's Purchasing Agreements specify that the advertising assessments are to be deducted from its payments to growers, its controller has testified that since at least July of 1991, Cal-Almond has not deducted the Almond Board advertising assessment from any of its growers' returns. (Nunes (controller of Cal-Almond, Inc.); Tr. 1937-1939 and Ex. CA5, page 3)

33. From 1990-1992, when Dr. Young was a food technologist for Dreyers Ice Cream (Tr. Young 1406-1407), Dreyers never received any promotional material from the Almond Board. (Tr. Young 1432)

34. Because of Dreyers stringent quality control requirements, out of all the handlers that attempted to supply Dreyers, only Cal-Almond was chosen. (Tr. Young 1433-1436, 1437-1438)

35. The percent of almonds in Dreyers ice cream runs 3%-6%. (Tr. Young at 1435)

36. The three Dreyers ice creams that contain almonds are extremely good sellers for Dreyers, and those specific varieties are not advertised. (Tr. Young 1438-1439)

37. Dreyers' director of quality assurance visited all of the plants that were in contention for the Dreyers business, in order to verify compliance with Dreyers' specifications. (Tr. Young 1440-1441)

38. Clyde Angle, president of Cal-Almond, Inc., has been a grower of almonds all of his life and has been a handler

for twenty years. (Tr. Angle 2164-2166) He believes that Cal-Almond was able to grow so fast because it kept its growers happy, and because of its personal service to its buyers. (Tr. Angle 2167-2168)

39. Cal-Almond has also developed an almond flour, which the Almond Board never advertises. Cal-Almond developed its own buyers for almond flour, and has developed a sizeable market for almond flour. (Tr. Angle 2169-2170)

40. Cal-Almond runs its blanching operation 365 days a year around the clock to keep up with the demand for Cal-Almond blanched products. (Tr. Angle 2171-2172)

41. Mr. Angle further testified that for the twenty years that Cal-Almond has been in business, there has been only one year that Cal-Almond did not pay its growers more than Blue Diamond paid theirs. (Tr. Angle 2174) Cal-Almond loans money to growers at a lower interest rate than offered by banks, and also loans money to growers who cannot, for credit reasons, borrow money needed to stay in business. In 1993-1994, he testified that Cal-Almond loaned growers in excess of five million dollars in order to keep them in business. (Tr. Angle 2174-2175) He further testified that numerous buyers and government officials have, after observing Cal-Almond's plant, told him that its plant is the cleanest operation in the industry. (Tr. Angle, 2177) In Mr. Angle's opinion, none of the ways the Almond Board allows a handler credit against the advertising assessments would be beneficial to Cal-Almond. If the Almond Board did not have advertising regulations, Cal-Almond would,

Mr. Angle testified, continue to promote its product, and would have more money to do so. (Tr. Angle 2184-2185)

Treehouse Farms, Inc.

42. Treehouse Farms, Inc. is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Treehouse Farms to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Treehouse Farms seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Treehouse Farms for the 1986-1987 marketing year and every subsequent marketing year.

43. Treehouse is a mid-sized almond handler that sells virtually all of its almonds for use as ingredients in other products. Treehouse does not sell any retail products. (Fitzgerald; Ex. TREE9, par. 2)

44. Treehouse's sales are effectuated through almond brokers to manufacturers of products that use almonds as ingredients; and Treehouse is therefore in the almost identical marketing situation as Cal-Almond, Inc., which is one of Treehouse's competitors. (Fitzgerald; Ex. TREE9, par. 2)

45. Approximately 80% of Treehouse's sales are sold into the foreign market. Treehouse's foreign sales have risen dramatically, whereas its domestic sales have risen only

gradually. (Fitzgerald; Ex. TREE9, par. 3; Fitzgerald; Ex. TREE5)

46. Treehouse opposes the Almond Board's generic advertising program and views the Board's program as having had no value to Treehouse. (Fitzgerald; Ex. TREE9, par. 4)

47. Treehouse believes that what sells its almonds is a fair price, Treehouse's efforts to contact customers, visiting potential customers at their facilities throughout the United States and overseas, showing Treehouse's facilities to potential customers, encouraging potential customers to visit Treehouse's facilities, and creating new and improved products by investing in new and improved technologies and quality control, none of which is assisted by the Board's generic advertising and promotional efforts. (Fitzgerald; Ex. TREE9, par. 4; Carey; Ex. TREE10, par. 2)

48. In Treehouse's opinion, none of its efforts to sell its product are assisted at all by the Board's creditable advertising program or the new credit-back program, and Treehouse cannot receive credit for its expenditures prior to 1993 that it believes promoted the sale of its almonds. (Fitzgerald; Ex. TREE9 paras. 4 & 5)

49. Prior to 1993, Almond Board regulations did not permit Treehouse to receive any credit for advertising products that contain Treehouse almonds (such as candy or cereal). Moreover, the manufacturers that sell these candies and cereal know how to advertise their products better than Treehouse would, and Treehouse's customers already know

that they want to purchase almonds, but the most important question for them is whether Treehouse can deliver quality almonds at a fair price. (Fitzgerald; Ex. TREE9 par. 5)

50. In Treehouse's opinion, the Almond Board's generic print advertising (Fitzgerald; Ex. TREE7) does not help sell Treehouse's almonds, and the branded forms of advertising available under the regulation would have a minimal effect, if any, on Treehouse's sales because of the nature of Treehouse's business. (Fitzgerald; Ex. TREE9 par. 6)

51. Treehouse does minimal "advertising" but for name recognition purposes only. Treehouse does not believe this advertising has had any value to Treehouse in identifying potential new customers. (Fitzgerald, Ex. TREE9 par. 7)

52. The amount of advertising assessment Treehouse has paid to the Almond Board for the crop years 1986 through the 1993-94 crop year are contained in Fitzgerald; Ex. TREE6 and TREE8, except for the 1987-1988 crop year, which Treehouse assumes the Almond Board would have. (Fitzgerald; Ex. TREE9 par. 8)

53. When almond prices went up substantially in 1993, many buyers expressed to Treehouse that if the high prices continued in that range, they would consider removing almonds from their products as ingredients. (Tr. Fitzgerald 71)

54. Although Treehouse's Purchasing Agreements specify that the advertising assessments are to be deducted from its growers, its president testified that Treehouse does not deduct advertising assessments from its growers returns,

and has not from and including the 1987-88 crop year through the current crop year. (Tr. Fitzgerald 81-84, 87-88; Ex. TREE 11)

55. In Treehouse's opinion, as stated by its president, generic advertising by the Almond Board does not increase the consumer demand for almond products; what sells almonds is packers spending time with their customers and talking to the research and development departments of those customers. (Tr. Fitzgerald 115; Carey Ex. TREE10, par. 2)

56. Treehouse has developed a new product that is a special slivered almond that is sold into Japan for a dried fish product, and the Japanese customers have expanded their business into that product which has sold more almonds, and Treehouse has spent funds to accommodate the Japanese buyer in this endeavor. (Tr. Fitzgerald 116-117)

57. Treehouse does not consult with the Almond Board or any public relations or advertising Committee or with their growers as to how Treehouse should market its almonds, because Treehouse knows best how to market its almonds. (Tr. Fitzgerald 125)

Gold Hills Nut Company, Inc.

58. Gold Hills Nut Company, Inc. is a handler of California almonds and subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Gold Hills to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be

avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Gold Hills seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Gold Hills for the 1992-1993 marketing year and every subsequent marketing year.

59. Bill Phipps is the president, chief financial officer and owner of Gold Hills Nut Company, Inc. which began handling almonds in 1986. (Phipps; Ex. GH3, par. 1)

60. For the 1992-93 crop year, Gold Hills handled 5,632,793 pounds of almonds, and all of it was sold into the export market. (Phipps; Ex. GH3, par. 3; GH1)

61. For the 1993-94 crop year, Gold Hills handled 9,997,462 pounds of almonds and 100% of that product was exported. (Phipps; Ex. GH3, par. 3; GH2)

62. Approximately twenty per-cent of Gold Hills' crop that it handles is owned by Phipps. (Phipps; Ex. GH3, par. 3)

63. For the 1992-93 crop year, almost all of Gold Hills creditable advertising assessment was spent buying 1/2 ounce packages of almonds from the Almond Board to be distributed to schools and churches. Gold Hills bought them in order to receive the "credit" under the advertising regulations, but they did not at all promote consumption of almonds nor increase Gold Hills' returns nor the returns to its growers. (Phipps; Ex. GH3, par. 4)

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64. In Mr. Phipps' opinion, the expenditure of the advertising assessment was a complete waste of money to Gold Hills. (Phipps; Ex. GH3, par. 4)

65. For the 1994-95 almond crop year, Gold Hills will handle approximately fifteen million pounds. In 1994 Gold Hills spent approximately one and a half million dollars on equipment specifically designed to provide high quality manufactured items to compete in the export market with Spanish manufactured products, and Gold Hills will spend substantial sums of money targeting those buyers who had previously bought Spanish manufactured products. It will cost Gold Hills a substantial sum of money targeting those buyers, but neither the equipment purchases nor the expenditures to target those buyers are creditable under the credit-back rules or the previous creditable advertising rules. (Phipps; Ex. GH3, par. 5)

66. Domestic brand advertising does nothing for Gold Hills since Gold Hills does not sell in the domestic market and Gold Hills does not have a "brand" that goes on store shelves, but instead sells all of its almonds to be used in ingredient items. (Phipps; Ex. GH3, par. 6)

67. Over the last three years Gold Hills has, at its cost, entertained a number of buyers and customers who have come to the Gold Hills facility so that Gold Hills can prove to those customers that Gold Hills can provide the best quality product possible with timely shipments and excellent service. None of those expenditures are creditable under the Board's advertising program. (Phipps; Ex. GH3, par. 6)

68. Gold Hills believes that its buyers overseas know what the best markets are for the products containing almonds, and they are not interested in any Almond Board advertisement. (Phipps; Ex. GH3, par. 6)

69. The new credit-back program has expanded the ways in which a handler may receive credit, but Gold Hills believes the new regulations to be even more burdensome in that a handler can receive only two-thirds credit for its advertising and promotion. (Phipps; Ex. GH3, par. 7)

70. Gold Hills believes it knows best how to market its product in its own targeted market; that the competitive returns that Gold Hills has paid its growers have not been caused by any Almond Board advertising program; and that if the advertising program did not exist, Gold Hills could make more money and could pay its growers more money. (Phipps; Ex. GH3, par. 7)

71. Gold Hills does not charge its growers for the Almond Board assessments. (Phipps; Ex. GH3, par. 3; GH4 through GH9; Tr. Phipps 1911-1913)

72. Gold Hills does not only contact buyers that already buy almonds; Gold Hills has contacted customers that have not previously bought almonds, and has been able to provide new customers with the type of product those customers wanted. (Phipps 1916-1918)

73. Gold Hills has always paid its growers more money per pound than Blue Diamond pays theirs. (Tr. Phipps 1923-1924)

74. A number of growers have brought product to Gold Hills because Gold Hills is fighting the advertising program. (Tr. Phipps 1926-1927)

75. Gold Hills has also slightly discounted its price to buyers overseas who advertise the product which is made from its almonds. Gold Hills believes this to be a good investment because the buyer will buy more of Gold Hills' product when consumption increases as a result of the buyers' specific advertising program, but this discount is not creditable under the advertising regulations. (Tr. Phipps 1929-1931)

Frazier Nut Farms, Inc.

76. Frazier Nut Farms, Inc. is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Frazier Nut to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Frazier Nut seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Frazier Nut, for the 1992-1993 marketing year and every subsequent marketing year.

77. Jim Frazier is the president of Frazier Nut Farms, Inc., an almond handler, which in 1992 handled 1,290,912 pounds and for the 1993-94 crop year handled 870,010 pounds. (Frazier; Ex. FN3, par. 1, FN1 & FN2)

78. Frazier sells brown almonds and most of its products are exported. Frazier finds that the best way to promote its product is to meet with buyers, have one-on-one sales meetings with those buyers and make plant improvements. (Frazier; Ex. FN3, par. 2)

79. Frazier is a much larger walnut processor than it is an almond processor, but many of Frazier's buyers buy both. Under the 1992-93 creditable advertising assessment, Frazier could not obtain credit for promoting almonds along with "competing nuts", which would include walnuts. (Frazier; Ex. FN3, par. 2)

80. Under the new credit-back rules, which restricts credits to two-thirds of the amount spent, a handler can receive credit for the promotion of both walnuts and almonds, but the amount of the credit is further reduced to the percentage of the net weight of the product containing almonds. (Frazier; Ex. FN3, par. 2)

81. In Mr. Frazier's opinion, neither the Almond Board, USDA, nor competitors sitting on the Almond Board know how to promote Frazier's product, and none of the Board's promotion or advertising assists Frazier's sales. (Frazier; Ex. FN3, par. 2)

82. If there were no Almond Board advertising assessments, Mr. Frazier states he would utilize that amount of money to increase the quality control of its product, and expand the types of products that Frazier could process to increase his customer base. (Frazier; Ex. FN3, par. 2)

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83. Frazier believes that advertising in magazines, radio, TV or newspapers would not help Frazier whatsoever to promote its products, as Frazier has no "store shelf" almonds, but sells its products to buyers who use the almonds as ingredients in other commodities. (Frazier; Ex. FN3, par. 2)

84. Mr. Frazier further testified that in his opinion, for every dollar Frazier has to spend on the Board mandated advertising program, not only does it lose that dollar because there is no benefit to Mr. Frazier from the Board's promotion programs, but it also loses the profits it could make on that dollar if spent on the ways that would increase the sale of its almonds; however none of those ways would be creditable under the Board regulations. (Frazier, Ex. FN3, par. 2)

85. Frazier does not deduct Almond Board assessments from its payments to growers. (Frazier Tr. 212)

86. Mr. Frazier believes that Almond Board generic advertising directed to the export market is of no benefit to Frazier because Frazier can sell everything that Frazier handles without any advertising. He testified that Frazier has more inquiries and more interest in its product than Frazier can possibly supply. (Tr. Frazier 213)

87. Mr. Frazier further believes that the Frazier name itself generates the interest in product, not advertising. (Tr. Frazier 214-215)

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Beard's Quality Nut Company

88. Beard's Quality Nut Company is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981.). The Almond Order's Promotion Plan requires Beard to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Beard seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Beard, for the 1986-1987 marketing year and every subsequent marketing year.

89. Steve Beard is the manager of the almond division of Beard's Quality Nut Company, an almond handler since 1969, and was the chairman of the public relations and advertising committee for the Almond Board for the preceding two years. (Beard BQN12, par. 1)

90. Mr. Beard testified that the public relations and advertising committee and the Almond Board consist of both growers and handlers, but growers do not know how to market almonds, yet they vote on the Board and at the public relation committee meetings with respect to where Almond Board money should be spent on advertising and promotion. (Beard BQN12, par. 1)

91. From 1986 to the present, Beard spent its creditable advertising assessment dollars and its credit-back dollars, not because Beard believed that it was of any benefit

spending the money under the very restrictive creditable advertising regulations or the new credit-back advertising regulations, but because if Beard did not spend the money it would be paid to the Board, and the Board would then spend the money advertising almonds as snacks to consumers, which benefitted Blue Diamond, not Beard. (Beard BQN12, par. 2)

92. Beard has no store shelf almonds for snacks or baking, but instead its almonds are marketed throughout the world, approximately 70% going to the foreign market and 30% to domestic sales, all as whole brown almonds used as ingredients. (Beard BQN12, par. 2)

93. In Steve Beard's opinion, none of Beard's compelled expenditures of dollars for advertising benefitted Beard or its growers, it only cost Beard money. (Beard BQN12, par. 2)

94. Beard has spent an enormous amount of time and money for which it could not receive credit either under the creditable advertising rules or the credit-back rule. These expenditures included personal contact with many customers and direct mailing to those customers. Beard also attempted to influence domestic customers to adjust their promotions to fit the Almond Board's rules of joint advertising, but its efforts were hampered in that the advertising regulation precluded credit for joint advertising if the products included "competing nuts" or did not make up at least 50% (fifty percent) of the net weight of the package, or if Beard's own label was not on the package. (Beard BQN12, par. 3)

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95. In almost all of the years at issue (1986-87 through the 1994-95 crop years), the compelled advertising assessment to Beard was anywhere from $50,000.00 per year to over $100,000.00 per year, and, in Steve Beard's opinion, none of those expenditures benefitted Beard. (Beard BQN12, par. 3)

96. During this same period of time Beard has spent a substantial sum of money improving its facilities, purchasing new equipment, purchasing new facilities and increasing the efficiency level and the quality of Beard's product so that it would open more markets to Beard, but the sums of money spent are not creditable under the Board's regulations, even though said expenditures have improved dramatically the marketability of Beard's almonds. (Beard BQN12, par. 3)

97. Steve Beard testified that if Beard did not have to spend money on the Almond Board's programs, it would be used for personal contact with buyers with follow-up promotional materials, ideas to tailor the customer's product with available types of almonds, working on quality line extensions at Beard's facility in order to produce a product that would appeal even more to the industrial users and customers; Beard sponsored seminars; and more travel to meet more buyers. Beard would also have more buyers and users hosted at Beard's facility. None of these forms of expenditures is creditable under the advertising regulations. (Beard BQN12, par. 5)

98. In Steve Beard's opinion, Beard has received absolutely no economic benefit from the advertising program from and including 1986 to the present, (the years under

challenge by Beard) but instead it has cost Beard hundreds of thousands of dollars. (Beard BQN12, par. 9; Tr. Beard 176)

99. Beard's credit-back advertising assessment, its creditable advertising assessments and its administrative assessments for the 1989-90 crop year through the 1993-94 crop year are set forth in exhibits BQN8 through BQN10.

100. Beard does not deduct assessments from its grower returns. (Tr. Beard 134-136)

Monte Cristo Packing Company

101. Monte Cristo Packing Company is a handler of California almonds and subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Monte Cristo Packing Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Monte Cristo seeks to have the Almond Order's Promotion Plan and Implementing regulations declared unlawful as they applied to Monte Cristo Packing Company for the 1986-1987 marketing year[6] and every subsequent marketing year.

102. Theron Shamgochian is the president of Monte Cristo Packing Company. Mr. Shamgochian supplied a

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6. *See* footnote 1 *supra.*

written declaration which was to be used as his direct testimony that would be subject to cross-examination at the oral hearing. However, Mr. Shamgochian became personally unavailable and did not take the witness stand. His statement (Ex. MC8) was received in evidence but it is unsworn and was not subject to cross-examination. In it he asserts a claim not only to all advertising assessments paid since 1980 but also to that portion of the administrative assessment which he asserts was used by the Board for advertising and promotion. Inasmuch as his attorney has proposed that refunds should start with the 1996-87 year, and there is no sworn testimony to support redress for prior years, Monte Cristo's claim is being limited to the period 1986-87 to present. There is insufficient evidence to support petitioner's claim that a portion of the administrative assessments were partially applied to advertising and promotion by the Board and should therefore also be eventually refunded.[7] During the creditable marketing years of 1986-1987, through 1991-1992, the opposite was true; a portion of the advertising assessments was applied to reduce subsequent administrative assessments. Other than Mr. Shamgochian's unsworn statement which was not subjected to cross-examination, there is no credible evidence in this record that any part of the administrative assessments were applied to advertising and promotion by the Board. For these reasons, these proposed findings by Monte Cristo have been rejected. The following findings, however, concerning Monte Cristo's general operating practices and the billings it received for

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7. Several other petitioners have made similar claims against the administrative assessments they paid, but those claims are also found to be unsupported by evidence that part of those assessments were used to pay for generic advertising and promotion.

advertising assessments from the 1986-1987 marketing year to present, have been made on the basis of Mr. Shamgochian's written declaration and the documents attached to it.

103. Monte Cristo sells all of its almonds for ingredient purposes. It sells a substantial amount of its product in Japan, Hong Kong, Korea, Macao and Mexico.

104. The Almond Board does not advertise in Mexico, and Monte Cristo's costs to enter that market were not creditable under either the credit-back or the former creditable advertising rules.

105. Mr. Shamgochian, his son and other representatives of Monte Cristo frequently travel overseas to Europe, Russia, Japan and Korea to meet with potential customers, and none of those travel expenses were creditable under the Almond Order's Promotion Plan.

106. Monte Cristo engages in lavish client entertainment which includes the hosting of a golf tournament in Japan; the annual hosting, since 1984, of a golf tournament and dinner in America for the entire almond industry, which includes growers, packers, brokers, exporters, importers, candy industry representatives and foreign users; supplying private airplanes, limousines and private automobiles to visiting almond buyers and paying the cost of their stay in California; and providing vacation stays for brokers, importers and users.

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107. Monte Cristo has spent over two million dollars in the last ten years on plant improvements in respect to its huller, sizing operation, electronic color sorters, length graders, picking rooms and cold storage facilities, so that Monte Cristo could be certified by all major domestic candy manufacturers, including M&M Mars, Hershey Chocolates, Sees Candies, Russell Stover and Banner. The expenses for these capital improvements are not creditable under the Almond Board's regulations.

108. If the Almond Order's Promotion Program were discontinued, Monte Cristo would continue to promote its product.

109. For 1986-87, Monte Cristo's creditable advertising assessment was as follows:

12,762,031 kernel pounds at 2 1/2 cents per lb:	$319,050.77
Credit was given for:	$290,584.35
Balance actually paid to Board:	$ 28,466.42

110. For 1987-88, Monte Cristo's creditable advertising assessment was as follows:

33,616,080 kernel pounds at 2 1/2 cents per lb:	$840,402.00
Credit was given for:	$840,402.00
Balance actually paid to Board:	– 0 –

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111. For 1988-89, Monte Cristo's creditable advertising assessment was as follows:

36,407,188 kernel pounds at 2 1/2 cents per lb:	$910,179.70
Credit was given for:	$910,179.70
Balance actually paid to Board:	– 0 –

112. For 1989-90, no almonds handled that marketing year.

113. For 1990-91, Monte Cristo's creditable advertising assessment was as follows:

5,496,879 kernel pounds at 2 1/2 cents per lb:	$137,421.98
Credit was given for:	$137,361.91
Balance actually paid to Board:	$ 60.07

114. For 1991-92, Monte Cristo's creditable advertising assessment was as follows:

8,123,862 kernel pounds at 1 3/4 cents per lb:	$142,167.59
Credit was given for:	$142,167.59
Balance actually paid to Board:	– 0 –

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115. For 1992-93, Monte Cristo's creditable advertising assessment was as follows:

8,870,776 kernel pounds at 1 1/4 cents per lb:	$110,884.70
Credit was given for:	$110,884.70
Balance actually paid to Board:	– 0 –

116. For 1993-94, Monte Cristo's credit-back advertising assessment was based on 11,015,717 kernel pounds handled at a rate of 1 cent per pound. This totaled $110,015,717. How much credit was given against this amount and how much was actually paid to the Board has not been shown.

Amaretto Orchards

117. Amaretto Orchards is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Amaretto Orchards to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Amaretto Orchards seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Amaretto Orchards for the 1986-1987 marketing year and every subsequent marketing year.

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118. Bruce Beretta is a general partner of Amaretto Orchards, which became a handler of almonds during the 1986-1987 season. Amaretto Orchards handles between approximately 1 million pounds to approximately 1.8 million pounds, and only markets its own tonnage grown. (Beretta AO1, par. 1; Beretta, Tr. 1954-1956)

119. Approximately 70% of Amaretto's product is exported; it has no retail brand; it sells brown almonds to be used as ingredients in manufactured products. (Beretta AO1, par. 1)

120. Mr. Beretta assumes that the Almond Board has records of the tonnage and assessment amounts paid by Amaretto Orchard from the 1986-87 season through the 1993-94 crop year. (Beretta AO1, par. 1)

121. From 1986 through the 1992-93 crop year, when the creditable advertising program, was in effect, Amaretto typically purchased half ounce packages of snack almonds from the Almond Board to give them to charities so that Amaretto could receive 150% credit for those purchases pursuant to the Board's regulations, but the distribution of the charitable packs did not promote Amaretto's returns nor did it increase buyer demand for Amaretto's product. (Beretta AO1, par. 2)

122. Mr. Beretta testified that, on a couple of occasions, Amaretto Orchards did do some "advertising" pursuant to the Almond Board regulations. However, Amaretto would not have engaged in this "advertising", but for the Promotion Program. In Mr. Beretta's opinion, there was no creditable

activity under the Program which would effectively promote or advertise Amaretto's product. (Beretta AO1, par. 2.)

123. Mr. Beretta further testified that in his opinion, not only was every dollar spent on advertising and promotion pursuant to the Almond Board's regulations lost as such, but also it left Amaretto with one dollar less to spend in ways that would promote its product. (Beretta AO1, par. 2)

124. Amaretto believes that the best way to promote its product is direct one-on-one salesmanship with buyers and customers; bringing buyers to its plant, entertaining the buyers while visiting its plant, and by travel overseas by Amaretto's representatives to promote its product. (Beretta AO1, par. 3)

125. Mr. Beretta testified that he has concluded that the Almond Board's generic advertising and promotion program has not assisted Amaretto, and that its payment to the Almond Board for its generic program is a complete waste of money. He further stated that Amaretto Orchards knows how to promote its product, not the Almond Board nor USDA, and if Amaretto had the money instead of having to pay it to the Almond Board, Amaretto would first use it to increase the quality control system at its facility in order to expand the number of potential buyers of its product. (Beretta AO1, par. 3)

126. On past occasions Amaretto paid the money directly to the Board for the creditable advertising assessment, in an attempt to take advantage of the 150% credit for early payments to the Board, but the Board

primarily used the money for a promotional program which was geared towards advertising consumer retail almonds, a market which Amaretto did not have. (Beretta AO1, par. 3)

127. Mr. Beretta testified that in his opinion, under the current credit-back regulations, there is no permissible form of promotion and advertising that would do Amaretto any good and be economically beneficial to Amaretto. (Beretta AO1, par. 3)

Del Rio Nut Company

128. Del Rio Nut Company is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Del Rio Nut Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Del Rio Nut Company seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Del Rio Nut Company for the 1986-1987 marketing year and every subsequent marketing year.

129. David Arakelian is the president and chief executive officer of Del Rio Nut Company and since 1987 has been a handler of almonds. (Arakelian DRN3, page 2)

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130. The principal markets for Del Rio's almonds are food manufacturers and export organizations. Del Rio has no retail sales. (Arakelian DRN3, page 2)

131. Del Rio's creditable advertising assessment for the crop years 1987-88 through the 1992 crop year are stated at page 2, exhibit DRN3.

132. Mr. Arakelian testified that the forms of credit available under the Almond Board regulations were, in his opinion, of no benefit to Del Rio, and did not compensate Del Rio for the direct contact with buyers that has been the most useful form of marketing and selling Del Rio's almonds. (Arakelian DRN3, page 3)

133. Mr. Arakelian further testified that he believed that the forms of credit allowed under the new credit-back program have not been sufficiently expanded to provide any significant business benefit to Del Rio. He perceives the individual efforts of Del Rio in marketing its own almonds to be the way that has most effectively expanded the demand for its product rather than advertising under the regulations. (Arakelian DRN3, pages 3 and 4)

134. For the 1993-94 crop year, Del Rio's advertising assessment was $42,168,05. Mr. Arakelian testified that in his opinion, there are no forms of advertising and promotion allowable under the credit-back rules that would allow Del Rio to effectively spend that money. (Arakelian DRN3, page 4)

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135. Del Rio does not charge most of its growers any of the assessments imposed by the Almond Board and USDA. However, in respect to some 5% of the tonnage it handles, Del Rio does custom processing on consignment, and does charge those growers the assessments. (Arakelian. Tr. 196, 199)

136. Del Rio's promotion consists of Mr. Arakelian selling the positive qualities of the Del Rio company and its product to its customers. Mr. Arakelian personally visits customers, and has customers visit the Del Rio facility, and on one occasion he flew 4,000 miles to visit a company which was involved in importing associated products, but was not at that point bringing in almonds. (Arakelian Tr. 201-202)

Monte Vista Farming

137. Monte Vista Farming is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Monte Vista Farming to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Monte Vista Farming seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Monte Vista Farming for the 1986-1987 marketing year and every subsequent marketing year.

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138. James Crecelius is the sole owner of Monte Vista Farming Company, which since 1985, has primarily handled California almonds. The number of pounds handled by Monte Vista is stated by Mr. Crecelius at page 2 of his written declaration. (DRN4, pg. 2)

139. Monte Vista's almonds are sold to food manufacturers and export organizations and have never been sold for retail sales. (Crecelius DRN4 page 2)

140. In Mr. Crecelius' opinion, none of the forms of advertising permitted under the Almond Board regulations were of any benefit to Monte Vista in the marketing of its almonds, and since most of Monte Vista's almonds are sold in the export market the personal selling relationships with buyers is the most important aspect of selling those almonds, which is not creditable under the Board's regulations. (Crecelius DRN4 page 31; Crecelius Tr. 185-186)

141. In the opinion of Mr. Crecelius, there is no significant business benefit for Monte Vista under the Almond Board's new credit-back regulations which took effect in the 1993-94 crop year. (Crecelius DRN4 page 3)

142. Mr. Crecelius testified that Monte Vista's individual selling efforts to its buyers is what sells Monte Vista's almonds, not advertisements taken out pursuant to the regulations. (Crecelius DRN4 page 4)

143. Monte Vista's advertising assessment for the 1993-94 crop year pursuant to the Almond Board is $65,561.87, and Mr. Crecelius believes that if Monte Vista

spent that sum on the permissible forms of advertising, it would not benefit Monte Vista's sales. (Crecelius DRN4 page 4; Crecelius Tr. 184-185)

Rotteveel Orchards

144. Rotteveel Orchards is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Rotteveel Orchards to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Rotteveel Orchards seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Rotteveel Orchards for the 1986-1987 marketing year and every subsequent marketing year.

145. John Rotteveel is a partner with his father. They grow and market California almonds, and have been almond handlers since 1986. (Rotteveel RO9, par. 1)

146. Rotteveel's advertising assessments for the 1987-1988 through 1993-1994 crop years are set forth in RO1 through RO8 and RO10. Rotteveel has misplaced the assessment notice for the 1986-1987 crop year, but assumes it to be in the Almond Board's possession. (Rotteveel RO9, par. 1)

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147. Rotteveel is a small handler of almonds and 80% of its almonds is shipped into the export market, and a significant part is shipped into the Netherlands from where the Rotteveels emigrated in 1962. (Rotteveel RO9, par. 1)

148. The Rotteveels promoted their product to their buyers by bringing the buyers from those export countries to Rotteveel's orchards and the processing plant. The Rotteveels have also traveled to Europe and Latin America to meet with prospective buyers and established buyers in order to develop new buyers and maintain their existing buyers. These travel costs are substantial but not creditable under the Almond Board's regulations. (Rotteveel RO9, par. 1)

149. Mr. Rotteveel testified that he believed that if his firm did not have to pay the money to the Almond Board or spend the money on permissible forms of advertising, the Rotteveels would use it instead to increase their market by doing more direct contact with existing and prospective customers, and increasing their processing lines in order to provide more buyers with the quality and packaging that they require. (Rotteveel RO9, par. 1)

150. Most of the time Rotteveel paid the money to the Almond Board on the earlier dates in order to earn the 150% credit. Sometimes the Rotteveels spent the money pursuant to the Board's rules and regulations but when they did so, in. Mr. Rotteveel's opinion, it was a complete waste of money, and had they instead retained the money, they could have promoted their product more effectively. (Rotteveel RO9, par. 2)

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151. Mr. Rotteveel believes the credit-back program to be even worse than the creditable advertising program because the handler only receives two-thirds credit towards its expenditures, and even though there are more ways to receive credit under the new program, it still does not permit credit for the types of promotion and selling activities that Rotteveel uses. (Rotteveel RO9, par. 2)

152. Mr. Rotteveel testified that because the Rotteveels are from the Netherlands, Rotteveel has a great market there. But those buyers, he believes, are not impressed with advertising, they are impressed with the quality of product that Rotteveel can ship them and the direct communication with them; all of which costs money, but none of which is creditable under the Board's regulations. (Rotteveel RO9, par. 3)

153. Mr. Rotteveel does not believe that the Almond Board's generic promotional program assists the Rotteveels in marketing their product nor does it increase the return to their growers. (Rotteveel RO9, par. 3)

154. If the Rotteveels were left with their assessment dollars instead of having to pay those dollars to the Board or spend them in wasteful ways pursuant to the Board's regulations, they could, in Mr. Rotteveel's opinion, make more money and increase the grower returns. (Rotteveel RO9, par. 3)

155. Rotteveel does not deduct the Almond Board's assessment from its grower payments. (Rotteveel Tr. 457-458)

156. In Mr. Rotteveel's opinion, because the Almond Board's generic program has not targeted any of Rotteveels' customers, they have derived no benefit from the program. (Rotteveel Tr. 462-463)

157. The Rotteveels would like to use the money that they otherwise have to spend on the advertising assessment to purchase new lines of equipment to provide buyers with specialty almond products. (Rotteveel Tr. 467-468)

158. The buyers that Rotteveel deals with in Holland have increasingly purchased more and more product from Rotteveel, and it was not because of the Almond Board advertising program. (Rotteveel Tr. 471)

Central Valley Growers Packing

159. Central Valley Growers Packing is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Central Valley Growers Packing to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Central Valley Growers Packing seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Central Valley Growers Packing for the 1986-1987 marketing year and every subsequent marketing year.

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160. Robert W. Christian is the sole owner of Central Valley Growers Packing, an independent almond handler during the crop years 1986-1987 through the 1992-1993 crop year. Exhibit CVG1 through CVG6 are the Almond Board Assessment Notices showing the tonnage handled, and the creditable advertising assessments, for the crop years 1986-87 through the 1992-93 crop year. (Christian CVG7, par. 1; CVG1 through CVG6)

161. More than 90% of Central Valley's handle during those years was exported; primarily to Europe and the Far East. During the crop years in question, the Board had no export promotional program, only a domestic program. (Christian CVG7, par. 2)

162. Mr. Christian testified that in his opinion, none of the permissible forms of advertising under the creditable advertising program were beneficial to Central Valley. Central Valley found the best way to sell its almonds to its foreign buyers was personalized service, and meeting their demanding quality requirements. (Christian CVG7, par. 2)

163. Instead of spending the money on advertising programs pursuant to the regulations which it believed would be wasteful, Central Valley just paid the advertising assessments to the Almond Board in order to receive the 150% credit payment. (Christian CVG7, par. 2)

164. Mr. Christian testified that if Central Valley Growers did not have to pay the money to the Almond Board for its almond promotion program, Central Valley Growers would have used the money to further promote its product

in the export market and paid the grower a higher return, but instead, the Board's generic promotion program and the creditable advertising assessments were a complete waste of money to Central Valley. (Christian CVG7, par. 2)

165. Central Valley Growers has no retail store shelf almonds, but sells its almonds as ingredients. (Christian CVG7, par. 2)

166. In Mr. Christian's opinion, much of the Almond Board's promotional program was designed to benefit Blue Diamond, and the creditable advertising regulations were fashioned to benefit Blue Diamond, not handlers like Central Valley. (Christian CVG7, par. 2)

167. Mr. Christian testified that if Central Valley Growers had retained the approximately $40,000.00 to $60,000.00 per year that it had to pay the Almond Board for assessments for the advertising program, Central Valley Growers would have instead spent more money on product research and development in an attempt to expand Central Valley's market and increase the grower returns. It was also his opinion that neither the Board nor Blue Diamond can do a better job of promoting Central Valley Growers' product than Central Valley Growers could if left with its money to do so. (Christian CVG7, par. 2)

168. Central Valley does not deduct Almond Board assessments from its grower payments. (Christian Tr. 226-227; CVG8)

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Hocker Nut Farm

169. Hocker Nut Farm is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Hocker Nut Farm to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Hocker Nut Farm seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Hocker Nut Farm for the 1986-1987 marketing year and every subsequent marketing year.

170. Steve Hocker is a partner with his father in Hocker Nut Farm which has been a handler of almonds from and including the 1986-87 through the 1993-94 crop year. It is a small handler, handling the pounds of almonds listed in paragraph 1 of the Hocker declaration, HNF6, with some of those assessment notices for those crop years from the Almond Board attached as HNF1 through HNF5. (Hocker HNF6)

171. Approximately 95% of Hocker's product is exported into the foreign market and Hocker only sells brown almonds, not manufactured almonds. (Hocker HNF1)

172. Mr. Hocker testified that for his firm's type of business, the best way to promote the product is one-on-one conversation and salesmanship to their buyers. (Hocker HNF6, par. 2)

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173. During the time of the creditable advertising rules, on occasion Hocker would take out an advertisement advertising its little country store selling almonds, but that was a complete waste of money; once the Board approved receiving 150% credit for early payments of the advertising assessments, virtually every year Hocker paid the Almond Board the money directly in order to receive the 150% credit. (Ex. HNF6, par. 2)

174. Under the new advertising credit-back regulations, there is no way to spend the money that would, in Mr. Hocker's opinion, assist his firm in promoting its product. If Hocker had that money, instead of having to pay it to the Board, Hocker testified he would use it to increase the efficiency of Hocker's equipment and quality, in order to open up better markets, and with improved quality could receive higher return per pound for those almonds. (Ex. HNF6, par. 2)

175. Hocker does not deduct the assessments from what it pays its growers. (Tr. 252-253)

176. Hocker sells its almonds through personal contacts, and has communicated with manufacturers that do not currently use almonds, in an effort to convince them to use almonds in their products. (Tr. 254-255)

177. In Mr. Hocker's opinion, the way the Almond Board spent the assessment money was of direct benefit to Blue Diamond who had retail store shelf almonds, not to someone like Hocker who sold almonds for ingredients. (Tr. 257-258)

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178. Mr. Hocker testified that it is his belief that the more efficient Hocker can be and the better product that Hocker can turn out, the better chance Hocker has to market that product at a higher price, and pay a higher return to the grower. (Tr. 261)

Bal Nut, Inc.

179. Bal Nut, Inc. is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Bal Nut to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Bal Nut seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Bal Nut for the 1986-1987 marketing year and every subsequent marketing year.

180. Vito Balice is the president of Bal Nut, Inc. which was incorporated in 1989. Bal Nut is a small handler handling 150,000 to 300,000 pounds of almonds each year. 80% of its almonds are exported. (BN1, par. 1; Tr. 263-267)

181. Bal Nut believes the best way to promote its product is to travel to various countries to meet various buyers, engage in one-on-one sales efforts with those buyers, and have follow-up phone calls with those buyers; all of this is done to make the buyers feel comfortable that Bal Nut can supply the product they require. (BN1, par. 1)

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182. Since 1989, Bal Nut has just basically paid the Almond Board the advertising assessments because Bal Nut could find no permissible way under the advertising regulations to use them that would actually promote Bal Nut's products. It did advertise almond butter once on radio in Wilkes-Barre, Pennsylvania, but the ad, which cost about $900.00 to air, only sold one pound of almond butter. (Tr. 272) Mr. Balice did not produce the advertising assessment notices and bills Bal Nut received, but believes that the Almond Board has records showing the amount of the advertising assessments for each of the years in question. (BN1, par. 1)

183. In Mr. Balice's opinion, Bal Nut receives no benefit whatsoever from the Almond Board's generic promotional program nor does it derive any benefit whatsoever from the Board's creditable and credit-back advertising program. (BN1, par. 2)

184. In Mr. Balice's opinion, if Bal Nut had the money that it otherwise has to pay for the Almond Board's advertising programs, Bal Nut would install a bathroom at its warehouse and fix the roof which leaks and spend more time meeting with potential customers in order to expand Bal Nut's market, and if it could expand that market, it could expand to include more growers. (BN1, par. 2; Tr. 269)

185. Mr. Balice testified that his small company cannot afford a person to keep up with paperwork that is necessary to receive credit against advertising assessments, but Bal Nut is large enough that Mr. Balice does not have time to personally deal with the paperwork. (BN1, par. 2)

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186. Mr. Balice believes he knows better than the Almond Board, the best way to promote Bal Nut's product in order to increase its profit and the amount it can pay growers. (BN1, par. 2)

Jardine Organic Ranch

187. Jardine Organic Ranch is a handler of California almonds subject to regulation under the California Almond Marketing Order (7 C.F.R. Part 981). The Almond Order's Promotion Plan requires Jardine Organic Ranch to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board which may be avoided only by engaging in branded advertising and promotion activities as specified and approved by the Almond Board. Jardine Organic Ranch seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Jardine Organic Ranch for the 1986-1987 marketing year and every subsequent marketing year.

188. Duane Jardine owns Jardine Organic Ranch and from the crop years 1986-87 through the 1994-95 crop Jardine has marketed only organically grown almonds, and organically grown almonds account for less than 1% of all of the almonds grown in California. (JOR1, par. 1)

189. Jardine is a very small handler, marketing anywhere from 40,000 to 120,000 pounds per year, and so the advertising assessment imposed by USDA and the Almond Board ranges anywhere from $1,000.00 to $3.500.00, which is a lot of money to Jardine. (JOR1, par. 1)

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190. Some years Jardine exports 100% of its product, some years its domestic shipments are 100%, and some years it does both, but all of its buyers insist upon organically grown and processed almonds, and therefore Jardine's product does not compete with 99% of the almonds grown in California. (JOR1, par. 1)

191. Jardine's buyers are willing to pay a premium price for organically grown almonds. The Almond Board's promotional program has never promoted or advertised organically grown almonds, and Jardine does not want to be associated with any organization that does not promote organically grown products. (JOR1, par. 1)

192. Jardine markets its products, through contact by telephone and meeting potential buyers at Jardine's booth at food expeditions. Other buyers find out about his product through promotional work done by the Farm Verified Organic Program which promotes certified organic products, which is not connected to the Almond Board. (JOR1, par. 2)

193. On several occasions Jardine has redesigned boxes and packaging using different labeling and sizes to accommodate customers, but that is not an expense which is creditable under the Almond Board regulations. (JOR1, par. 2)

194. Jardine has also spent money bringing customers to Jardine's premises, but that is not creditable under the Almond Board regulations. (JOR1, par. 2)

195. Jardine has received credit for billboard advertising in California, and is eligible for credit-back on its participation at food trade shows, but none of the other ways that Jardine would use to promote its product are creditable under the Almond Board regulations. (JOR1, par. 3; Tr. 288-289)

196. Jardine has been a long time critic of the Almond Board's advertising regulations and its generic program, because its program does not assist in selling organically grown almonds, and in Mr. Jardine's opinion, there is no way that the Almond Board can assist Jardine in promoting his organically grown almonds. (JOR1, par. 5)

B. The Almond Order and Its Promotion Program

197. The Secretary promulgated the Almond Marketing Order in 1950, pursuant to statutory authority, pertinent regulations and implementing rulemaking actions. 7 U.S.C. §§ 601 *et. seq.* (1994); 7 C.F.R. §§ 981.1-474 (1994); 15 Fed. Reg. 4272; 15 Fed. Reg. 3623 (1950).

198. The Almond Order was promulgated to stabilize the almond industry. There were high levels of production that were predicted to continue. There was evidence that indicated that if current production levels continued, there would be a significant decrease in price. The Order's goal is to provide an "adjustment of the supply of almonds to the domestic trade demand," and as a result, increase grower returns. 15 Fed. Reg. 3623, 3624 (1950).

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199. The Almond Order contains provisions for advertising and promotion by the Almond Board which administers the Order and the regulations which implement the advertising and promotion program. The Almond Board gives credit against "advertising assessments" to those handlers who engage in specified forms of branded advertising and brand promotion. The purpose of both the Board's generic advertising and promotion, which is paid for out of those "advertising assessments" actually collected from handlers, and for the branded advertising and promotion which the Promotion Program encourages, through the credits, is to achieve the Order's asserted goal.

200. The Almond Board's generic advertising and promotion activities seek to build demand through the changing of consumer preferences by providing information to manufacturers and end users about the essential features of almonds.

201. Increasing the demand for a product involves influencing consumer attitudes so that more of a product can be sold at the given price, the same amount can be sold at a higher price, or more of the product can be sold at a higher price.

202. The marketing mix available to firms and organizations marketing products and services includes advertising, promotion, publicity and public relations.

203. Advertising is defined as paid broadcasting of a message in the television, radio, or print media. It can also involve the providing of point-of-purchase materials to

retailers. Promotion involves the placing of information oriented messages such as a product's nutritional aspects or suggestions for its preparation, in the various media.

204. Since advertising is an efficient way of reaching a large number of people, organizations that market products that are aimed directly to consumers spend considerable sums on advertising.

205. An acceptable working definition of "generic advertising", which respondent has requested as a finding, is the cooperative effort among producers of a nearly homogenous product to disseminate information about the underlying general attributes of the product to existing and potential customers for the purpose of strengthening demand for the commodity.

206. An acceptable working definition of "branded advertising", which respondent has requested as a finding, is the effort of an individual firm in the product category that emphasizes the particular attributes of its brand as compared to competing bands.

207. Brand and generic advertising can be complementary when they have mutually reinforcing effects on consumer choice.

208. The rationale for government compelled advertising and promotion assessments has been that everyone who benefits from advertising should share equitably in its cost and not be a "free rider."

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209. All six agricultural economists called by the government as expert witnesses, Dr. Ronald Ward, Dr. Henry Kinnucan, Dr. Richard Sexton, Dr. Jason Christian, Dr. Hoy Carman, and Dr. Olan Forker, are experienced researchers on the impact of advertising on commodities. Dr. Russell Winer and Dr. Margaret Campbell, professors of marketing, are experts in the area of advertising theory. The agricultural economist called by petitioners, Professor Michael K. Mohlgenant is also an experienced researcher. Professor Scott Davis who was called by petitioners is an expert in the area of marketing and advertising theory as well as economics.

210. The testimony of the agricultural economists called by the government and the empirical results from their studies on various agricultural commodities confirm that cooperative generic advertising and promotion can be a viable tool for building demand and ultimately increasing producer returns.

211. In assessing the effectiveness of the Almond Order Promotion Program, it is important to note that there are two very distinct Almond Board advertising and promotion programs at issue.

212. The first, the "creditable advertising" program was in effect through and including the 1992-1993 season (July 1, 1992 to June 30, 1993 — 7 C.F.R. 981.10). This was essentially a program of creditable industry advertising with a small and ineffective Almond Board generic element.

213. The second program, the "credit-back" program began with the 1993-1994 season. It envisions a large, amply

funded generic advertising, promotion and public relations program operated by the Almond Board, with various efforts in both the domestic and export markets. It allows handlers to receive partial credit back for thirteen more forms of branded advertising and brand promotion efforts by handlers than were allowed as "creditable" under the former program.

214. Blue Diamond Growers, Inc. dominated the pre-1991 period of the "creditable advertising" program. Respondent has estimated that Blue Diamond represented well over 60% of the industry from 1960 through 1980 and after 1980, remained over 50% through the 1990-91 market year. Blue Diamond has generally sold approximately 90% of all almonds sold to the domestic retail trade either as snacks or for home cooking use.

215. During the 1987-88 through the 1990-91 marketing years, the total expenditure by the Almond Board for generic advertising, promotion and public relations ranged between $840,000 to $1,400,000 per year, whereas during the same time period, Blue Diamond spent $8,000,000 to $14,200,000 per year on its branded advertising which was primarily directed to the domestic retail market.

216. Algernon Greenlee is a retail business manager for Blue Diamond Growers, and for the previous six years had been the advertising manager. (Tr. Greenlee 297)

217. Blue Diamond sells almonds in approximately 96 countries around the globe. Domestically, Blue Diamond sells almonds to ingredients users and sells its own retail line of store shelf snack almonds. (Tr. Greenlee 298-299)

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218. Blue Diamond believes that its various types of advertising have been effective. (Tr. Greenlee 300)

219. Because the advertisement assessment rate was lowered, Blue Diamond has decreased the amount it spends on advertising. (Tr. Greenlee 306-307)

220. Blue Diamond had no research as to whether or not their advertisements actually increased consumption of Blue Diamond almonds. (Tr. Greenlee 314-317)

221. Blue Diamond will not advertise when it does not realize a favorable return on the dollars spent. (Tr. Greenlee 319-320).

222. Blue Diamond discontinued advertising their Can-A-Week advertising program, because they did not see a return on the dollars spent. (Tr. Greenlee 320)

223. Blue Diamond has a sales force that calls on customers, which it believes helps promote the sale of almonds. (Tr. Greenlee 321-322)

224. Blue Diamond believes that sales contacts with buyers does increase the overall demand for almonds. (Tr. Greenlee 332-333)

225. Blue Diamond would not support a total generic program run by the Almond Board (Tr. Greenlee 333)

226. Blue Diamond is not convinced that the overall consumption of almonds would increase if the Almond Board

had a straight generic advertising program. (Tr. Greenlee 333-334)

227. Blue Diamond does not need encouragement from USDA to promote its almond products and would continue to engage in branded advertising in the absence of the Almond Order's Promotion Program. (Tr. Greenlee 334-335)

228. For most of the years from 1980 through 1991-92 the creditable advertising assessment rates were 2 1/2 cents per pound. The Almond Board had a much smaller generic promotional program during that period of time and no foreign promotional program. (Tr. Greenlee 336)

229. Blue Diamond advertises because Blue Diamond believes that there is a return on that investment (Tr. Greenlee 339)

230. When the advertising assessment rate was 2 1/2 cents per pound Blue Diamond believes that it hurt their returns to their growers; it did not earn Blue Diamond more than the 2 1/2 cents that was spent. (Tr. Greenlee 339)

231. The retail line of almonds, which includes snack almonds, almonds that a consumer would buy for baking purposes, and bulk almonds sold to the produce departments of grocery chains makes up only 20 to 30% of all almonds sold domestically or 10 to 15% of all of the almonds sold worldwide. (Tr. Greenlee 342-343)

232. Blue Diamond has close to 90% of that retail market. (Tr. Greenlee 343)

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233. The primary other competition for the retail almond trade is from companies not regulated under the marketing order, such as Fishers and Planters. (Tr. Greenlee 343-344)

234. The percentage of the domestic sales that go to the retail markets has not increased over the last five years. (Tr. Greenlee 344)

235. A premium price is paid for the retail almond line. (Tr. Greenlee 344)

236. Blue Diamond sets its advertising expenditures in accordance with the assessment rate. (Tr. Greenlee 338, 351) But Blue Diamond would continue to advertise without the compulsion of the marketing order. (Tr. Greenlee 339)

237. Blue Diamond is concerned that in the absence of the Almond Order's Promotion Plan, it would spend more money on advertising than competing independent packers. (Tr. Greenlee 351)

238. During the Almond Board's compelled advertising program when the creditable advertising assessment was usually set at 2 1/2 cents per pound, several major independent companies went out of business. (Tr. Greenlee 355-356)

239. Approximately 2 years ago the Board retained the firm of Hallberg and Schierson to determine the effectiveness of the Board's generic program, and it was their opinion that the Board's past program had not been effective. (Tr. Greenlee 356-357)

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240. When the Almond Board began receiving "MPP Money" from the Federal Government for overseas advertising, Blue Diamond received the majority of the funds. (Tr. Greenlee 357-358)

241. In approximately 1990, Blue Diamond spent approximately seven million dollars in television advertising, but today it is only spending two to three million dollars. If Blue Diamond thought that it was receiving $2 for every $1 of advertising money spent, it would spend more money (Tr. Greenlee 363-364)

242. The price paid for almonds does not necessarily correlate with the return on acreage owned by a grower. (Tr. Greenlee 367-368)

243. As of the 1993-94 crop year, Blue Diamond marketed between 30 and 40% of the entire California tonnage, but received over 50% of the foreign agricultural service MPP funding to the almond industry. (Tr. Easter 374-376)

244. The vast majority of all almonds grown in California are sold as ingredients used in other products, with candies the largest ingredient usage, cereal being the second largest, ice cream being the third, and almonds used as snacks being a very small percentage of the sales of almonds. (Tr. Lundeen 1305-1308)

245. The previous Almond Board regulations gave handlers a financial incentive to purchase 1/2 ounce generic charity packs from the Almond Board, and several witnesses

testified that they did so. (Ryan Tr. 406; Campos Tr. 593, 605) However, it is questionable whether the distribution of these packs to schools and charities increased the overall demand for almonds. (Phinney Tr. 2256) Dr. Campbell, the marketing expert called by USDA, agreed that managers in each handler's firm know best how to advertise and promote their products. (Tr. Campbell 1746-1747), and that personal selling can encourage new product usage and improve overall demand for the product. (Tr. Campbell 1764)

246. Several of the USDA's experts admitted that many of their studies had indicated that other advertising and promotion programs had been failures, including those for avocados; (Tr. Carman 1166); apples, (Tr. Carman 1181); dairy, (Tr. Ward 1528); and beef, (Tr. Kinnucan 744). One of USDA's experts, Dr. Kinnucan, noted that there have been many other instances where economists found that generic advertising has been ineffective, although many of them are not published, because it is difficult to get the "failures" published. (Tr. Kinnucan 714)

247. Except for Dr. Jason Christian, of the School of Economics, University of California-Davis, none of the economic experts called by respondent had studied the effect of advertising in the almond industry. (Tr. Dr. Sexton 929-931; Tr. Dr. Carman 1176-1177; Tr. Dr. Kinnucan 731-733; Tr. Dr. Winer 776-778; Tr. Dr. Forker 853-856; Tr. Dr. Ward 1487-1490; Tr. Dr. Campbell 1733-1734)

248. Dr. Jason Christian prepared a written statement of his testimony (RX Ex. 252), authored a study entitled "Individual Industry Effects of Branded Advertising of

California Almonds" (RX 31, numbered pages 320-344) in February of 1994 and produced another study of September 19, 1994 entitled "The Economic Effects of Advertising in the California Almond Industry" (RX 159). Dr. Christian was called by USDA as its primary expert witness as to the effectiveness of the Almond Board's advertising program (RX 252).

249. When the Almond Board contracted with Dr. Christian to research the economic effects of advertising in the California almond industry, the only data on advertising expenditures given him was Blue Diamond's.

250. Dr. Christian found a direct correlation between the total volume of almonds sold and the amount Blue Diamond spent each year to advertise. He concluded that the more Blue Diamond advertised, the more demand increased. However, because Blue Diamond correlated its advertising budget to the amount of its annual advertising assessment which was computed on a per pound handled basis, the amount Blue Diamond spent on advertising was obviously greater in the years when the higher volumes were sold; and it may well be that higher sales volumes caused higher advertising expenditures by Blue Diamond, and not the other way around. (Dr. Wohlgenant, J. Pet #2, page 7, par. 6)

251. Dr. Christian's September 19, 1994 report (Rx 159), did not examine the effects of the Almond Board's generic advertising program.

252. None of Dr. Christian's studies measured the effect of advertising after 1992 and the Almond Board's current advertising and promotional activity was not examined by Dr. Christian (Christian Tr. 1004)

253. Dr. Christian's study did not enable him to distinguish the impact Blue Diamond's advertising may have had on the sales of products containing almonds.

254. Dr. Christian's studies are unable to demonstrate differentiated advantages among growers or handlers attributable to Blue Diamond's advertising. (Christian Tr. 1005)

255. Dr. Christian did not undertake to answer whether the generic promotion by the Almond Board, or the brand advertising and promotion by handlers other than Blue Diamond had an effect on overall almond demand.

256. Professor Scott Davis of the Graduate School of Management, University of California-Davis, a trained economist and an expert in marketing and advertising, testified that inasmuch as the advertising conducted by Blue Diamond during the time period studied by Dr. Christian was primarily directed to the retail market (Can-A-Week), one would expect substantial growth in the demand by the household consumption market as compared to the share attributable to demand by ingredients buyers. However, the opposite was true. (Dr. Davis, J. Pet #1, page 8) It is found, therefore, as Dr. Davis asserted, that it is most improbable that Blue Diamond's advertising was the primary stimulator of increased demand by ingredients buyers.

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257. Advertising in the United States has not caused the volume of exports to increase. (Christian Tr. 1007)

258. Although it may be that under "The Law of One Price", Blue Diamond's advertising helped it sell more almonds domestically, and this in turn resulted in Blue Diamond having less almonds for export which may have led to higher prices overseas, where demand is inelastic[8], it is not appropriate to characterize Blue Diamond's competitors as "free riders" who should be compelled to make equivalent expenditures in compensation for this kind of incidental benefit. This benefit is far too remote; it is unintended; and it is not proportional to the benefits realized by Blue Diamond in capturing additional sales in the more profitable domestic retail market.

259. There are a number of expenditures that go into the marketing mix, and advertising is only one element that can be used to expand the demand for a product. Other communication tools that are available include promotions, such as free samples or special displays, publicity (such as press releases that communicate new product benefits), personal selling, product improvement and improved availability which make the product more attractive to potential customers and raise their willingness to pay for the product. Christian's study never addressed the influence of these other selling techniques on raising the demand for almonds or on the grower return. (Dr. Davis, J. Pet. No. 1, page 2, pages 8-9, 13-14)

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8. When demand is inelastic, a price increase will not result in a lessening of demand; when demand is elastic, an increase in price will decrease sales.

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260. The advertising and promotional program permitted by the Board for credit and the promotional material published by the Almond Board seem unlikely to have stimulated demand by ingredient buyers, where most of the almonds are sold. (Dr. Davis, J. Pet. Ex. 1, page 8)

261. Growers have not significantly benefitted from the ineffective and inconsequential branded advertising and brand promotion by the independent handlers who compete with Blue Diamond, which the "creditable advertising" and the "credit-back" programs have induced. Nor have these branded advertisements and promotions more effectively expanded the overall market for almonds than would have resulted from the efforts of these handlers in the absence of the Almond Order's Promotion Plan.

Conclusions of Law

A. Respondent has the burden of proof in these proceedings. *Cal-Almond, Inc. v. United States Department of Agriculture*, 14 F.3d. 429 (9th Cir. 1993).

B. Respondent has failed to meet its burden of proving that the Almond Board's advertising and promotional program for the crop years 1986-87 through 1994-95 directly advanced the governmental interest of selling more almonds and increasing returns to growers which USDA asserted in justification of its regulation of petitioners' commercial speech.

C. Respondent has failed to meet its burden of proving that the Almond Board's advertising and promotional

program for the crop years 1986-87 through 1994-95 was no more extensive than necessary to serve the governmental interest of selling more almonds and increasing returns to growers which USDA asserted in justification of its regulation of petitioners' commercial speech.

D. For the aforegoing reasons, the Almond Board's advertising and promotional program for the crop years 1986-87 through 1994-95 was not in accordance with law.

Done at Washington, D.C.
this 15th day of June, 1995

s/ Victor W. Palmer
VICTOR W. PALMER
Chief Administrative Law Judge

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND DECIDED DECEMBER 22, 1993

CAL-ALMOND, INC., a California corporation

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

Defendant-Appellee.

CAL-ALMOND, INC., a California corporation, Saulsbury Orchard and Almond Processing, Inc., Carlson Farms, a sole proprietorship

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

Defendant-Appellee.

CAL-ALMOND, INC., a California corporation, Gourmet Packing Co., a California corporation, Gold Hills Nut Co., Inc., a California corporation

Plaintiffs-Appellants,

v.

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UNITED STATES DEPARTMENT
OF AGRICULTURE

Defendant-Appellee.

CAL-ALMOND, INC., a California corporation,
Gold Hills Nut Co., Inc., a California corporation

Plaintiffs-Appellants,

v.

UNITED STATES of America

Defendant-Appellee.

Nos. 92-16033, 92-16034, 92-16031 and 92-16527.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 12, 1993.
Decided Dec. 22, 1993.

* * *

Appeal from the United States District Court for the Eastern District of California.

Before: CHOY, SCHROEDER, and BRUNETTI, Circuit Judges.

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BRUNETTI, Circuit Judge:

Two groups of almond handlers are challenging various provisions of the California Almond Marketing Order, which regulates the California almond handling industry. Both groups challenge the United States Department of Agriculture ("USDA") almond marketing program administered by the California Almond Board (the "Board"). The first group is also separately challenging the assessment imposition procedure used by the Board from 1980 to 1986. The second group is separately challenging the validity of the reserve requirement rules for the crop years 1988-89 and 1990-91. The district court affirmed a USDA Judicial Officer decision upholding the Almond Marketing Order against these challenges, and the handlers appeal. We affirm the district court's decision on the assessment imposition procedure and the reserve requirement rules, but hold that the marketing program violates appellants' First Amendment rights to freedom of expression and association.

I. THE ALMOND MARKETING PROGRAM

A. Facts and proceedings below.

Appellants Cal-Almond, Saulsbury Orchards, and Carlson Farms are "handlers" of California almonds. They receive almonds from growers, process them, and sell the resulting product, primarily for use as ingredients in candy, ice cream, and cereal. Cal-Almond and Saulsbury also operate mail-order businesses through which they sell whole almonds.

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The California almond handling industry is regulated by the Almond Marketing Order, 7 C.F.R. § 981 (the "Order"). The Order was established in 1950 by USDA pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c (the "Act"). The purpose of the Act is to "establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce" as "to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. §§ 602(1), 602(4) (1988). The Act authorizes the Secretary of Agriculture (the "Secretary") to issue, following notice and an opportunity for hearing, marketing orders that will "tend to effectuate the declared policy of [the Act]" with respect to the particular commodity. 7 U.S.C. § 608c(4) (1988).

The Order is administered by the Board, which has the power to "make rules and regulations to effectuate the terms and provisions" of the Order. 7 C.F.R. § 981.38 (1993). The Board has ten members, all of whom are industry representatives appointed by the Secretary. The Board engages in a variety of activities, including research and development, marketing, quality control, and volume regulation. The Act specifically provides that the Order may establish "marketing research and development projects designed to assist, improve, or promote the marketing" of almonds. 7 U.S.C. § 608c(6)(I) (1988). Pursuant to this authorization, the Board funds a generic pro-almond public relations program, consisting of such items as newspaper inserts containing almond recipes, leaflets and magazine articles about the benefits of almonds, promotional materials for school lunch programs, and press kits for industrial customers.

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The money to pay for the Board's activities, including the marketing program, comes from assessments collected from handlers, based on the volume of almonds they handle. However, the Act and the Order provide that a handler's assessment will be reduced, up to a point,[1] by the amount that the handler spends on authorized advertising.[2] Before a handler can receive credit for his marketing promotion expenditures, the Board must determine that such expenditures meet the requirements of the "creditable advertising regulations" set forth in 7 C.F.R. § 981.441.

The Order thus establishes an overall almond marketing program, which combines generic almond promotion conducted by the Board with Board-approved handler advertising. Beginning in 1984, appellant Saulsbury, which strongly opposed this program, refused to pay its annual assessments to the Board. In 1986, the United States sought an injunction in federal district court, pursuant to 7 U.S.C.

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1. A handler may receive credit against his assessment in an amount not to exceed "that portion of his assessment designated for marketing promotion including paid advertising." 7 C.F.R. § 981.41(c) (1993). For example, for the 1986-87 crop year, the overall assessment was 2.6 cents per pound, and the maximum credit was 2.5 cents per pound.

2. The Act provides that handlers may receive credit "for such marketing promotion including paid advertising as may be authorized by the [O]rder." 7 U.S.C. § 608c(6)(I) (1988). The Order authorizes the Board, with the approval of the Secretary, to provide "for crediting all or any portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products, or their uses." 7 C.F.R. § 981.41(c) (1993).

§ 608a(6), to compel payment of some $300,000 in assessments which Saulsbury allegedly owed and had not paid to the Board. Saulsbury Orchards and Almond Processing, Inc. v. Yeutter, 917 F.2d 1190, 1193 (9th Cir.1990). The district court granted summary judgment in favor of the government, and ordered Saulsbury to comply with the Order and pay the assessments. Id. The court refused to entertain Saulsbury's affirmative First Amendment defenses because it found that Saulsbury had not exhausted its administrative remedies pursuant to 7 U.S.C. § 608c(15)(A).

In April 1987, Saulsbury, joined by appellants Cal-Almond and Carlson Farms, filed an administrative petition, pursuant to 7 U.S.C. § 608c(15)(A), challenging numerous parts of the Order (including the almond marketing program) for the crop years 1980-87.[3] Following a hearing in the summer of 1989, a USDA administrative law judge ("ALJ") issued a decision on June 22, 1990 upholding some of appellants' challenges but rejecting others, including the challenge to the marketing program. Both sides appealed the ALJ's decision to the USDA Judicial Officer ("JO"). On January 23, 1991, the JO upheld the Order in all respects.

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3. Saulsbury, believing that it would suffer irreparable injury if it were forced to exhaust its administrative remedies, also filed a complaint in district court, again alleging that the Order was unconstitutional. The district court again dismissed the action on the ground that Saulsbury had failed to exhaust its administrative remedies. Saulsbury, 917 F.2d at 1193. We affirmed the dismissal in Saulsbury. Id. at 1197.

Meanwhile, Cal-Almond had filed another petition pursuant to 7 U.S.C. § 608c(15)(A), challenging a specific section of the creditable advertising regulations, 7 C.F.R. § 981.441(c)(2), for the crop year 1988. The ALJ upheld the challenge, but his decision was reversed by the JO. The two petitions were consolidated for cross-motions for summary judgment to the district court. On June 3, 1992, the district court issued an order upholding the JO's decisions in their entirety. Appellants appeal this order.

B. Standard of review.

We review de novo a district court's grant of summary judgment. T.W. Electrical Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629 (9th Cir.1987). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir.1989).

C. Discussion.

1. Infringement on appellants' First Amendment rights.

The district court held that the almond marketing program did not even implicate, let alone violate, appellants' First Amendment rights, "because plaintiffs are not 'compelled' to advertise." However, while the Order clearly does not compel appellants to advertise, it does compel them to expend a certain sum of money every year, on either

assessments or creditable advertising. Since either alternative burdens appellants' First Amendment rights, these rights are clearly implicated by a program containing both.

Assume first that the creditable advertising regulations did not exist and that handlers paid the full amount of their assessment to the Board. A substantial portion of that amount would be used by the Board for the generic almond promotion program, which infringes on appellants' First Amendment right to be free from compelled speech and association. See United States v. Frame, 885 F.2d 1119 (3d Cir.1989), cert. denied, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990). Frame involved a First Amendment challenge to the Beef Promotion and Research Order, 7 C.F.R. §§ 1260.101-.217, promulgated by USDA pursuant to the Beef Promotion and Research Act, 7 U.S.C. §§ 2901-11. The Beef Promotion Order established a "Cattlemen's Board," whose goal would be to increase beef sales, and authorized it to collect an assessment of $1.00 per head of cattle from cattle producers and importers. Id. at 1122-23. Frame, a cattle breeder and auctioneer, refused to pay the assessment, and, when sued by the federal government, asserted that the Beef Promotion Act violated his First Amendment rights of free association and free speech. Id. at 1129.

The Third Circuit noted first that citizens arguably do not have the right to refuse to support financially government programs that involve speech they find objectionable. Id. at 1131. However, the court also found that the promotional expression sponsored by the Cattlemen's Board could not properly be characterized as "government speech"

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> Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes . . . This sort of funding scheme [establishes a] close nexus between the individual and the message funded.

Id. at 1132 (citations omitted) (emphasis added). The court found that the Beef Promotion Act implicated Frame's First Amendment rights because it resembled other funding schemes that the Supreme Court had held to implicate individuals' First Amendment rights. Id. at 1132-33, citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (union-management agency shop agreements, which require that every employee pay the union a service charge equal in amount to union dues, impinge on employees' rights to be free from compelled affirmation of belief and compelled association for expressive purposes) and Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (state law requiring citizens to bear state slogan, "Live Free or Die," on automobile license plates, implicates First Amendment rights because law requires

individuals to participate in the dissemination of an ideological message).

The Board's almond promotion program closely resembles the beef promotion program at issue in Frame. In both cases, a "publicly identified group" (cattlemen or almond handlers) must contribute money to fund the "dissemination of a particular message associated with that group." For the same reason that the beef program implicated Frame's First Amendment right to be free from compelled speech and association, then, the Board's promotional efforts implicate appellants'.

Assume next that the Order imposed on handlers no assessment or other compelled contribution to the Board whatsoever, but only required that they spend the equivalent sum every year on advertising that met the requirements of 7 C.F.R. § 981.441. Such an Order also would clearly implicate appellants' First Amendment rights, both because it would compel them to speak and because it would impose content-based restrictions on that speech. See Wooley, 430 U.S. at 714, 97 S.Ct. at 1435 ("the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

Thus, both an assessment-only program and an advertising-only program would implicate appellants' First Amendment rights. Because the Order is a combination of both, it implicates those rights as well. USDA's argument that the creditable advertising regulations do not implicate those rights because they do not "compel" appellants to

advertise ignores the fact that if handlers do not advertise according to the regulations, they must contribute their assessment to the Board,[4] which is itself a type of compulsion implicating appellants' First Amendment rights.

2. Type of speech restricted.

Having determined that the almond marketing program implicates appellants' First Amendment rights, we must now select the proper standard to evaluate the constitutionality of the program. Appellants claim, and we agree, that the program infringes on both their right to free speech and their right to free association. The Supreme Court has established different tests for each of these. Restrictions on lawful and non-misleading commercial speech[5] are evaluated using the

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4. Handlers may also earn credits by engaging in other promotional activities, such as distributing sample packages of almonds to charitable or educational outlets, purchasing promotional materials available from the Board, or certain direct mail promotions. 7 C.F.R. 981.441(d)(1)(i)-(iii) (1993). The availability of such options does not change the First Amendment analysis; they simply represent other types of expressive activity the only alternative to which is the compelled assessment. In practice, the "vast majority" of creditable advertising expenditures are spent on advertisements and not on these alternatives.

5. "Commercial speech" is that which "propose[s] a commercial transaction." Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986) (quotation omitted). All of the promotional efforts undertaken by the Board, whether directly (through its own activities) or indirectly (through the inducements of the creditable advertising regulations), are aimed at increasing almond sales. The program therefore deals with commercial speech.

three-prong standard of Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). First, the asserted government interest behind the restrictions must be "substantial." Id. at 566, 100 S.Ct. at 2351. Second, the restrictions must "directly advance[ ] the governmental interest asserted." Id. Third, the restrictions must be "not more extensive than is necessary to serve that interest." Id.

Government programs that compel association are evaluated under a more stringent standard. The Supreme Court has recognized that "[f]reedom of association . . . plainly presupposes a freedom not to associate." Roberts v. United States Jaycees, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462 (1984). See also IDK, Inc. v. Clark County, 836 F.2d 1185, 1192 (9th Cir.1988) ("[t]he first amendment . . . gives us the freedom not to assemble with those whose goals we do not share."). In Roberts, the Supreme Court held that infringements on the right of free association must be "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." Roberts, 468 U.S. at 623, 104 S.Ct. at 3252. The Frame majority applied this test to the Beef Promotion Act. See Frame, 885 F.2d at 1134. However, because we hold the almond marketing program unconstitutional even under the less stringent Central Hudson standard, we do not decide which of these two should apply. See id. at 1146 (Sloviter, J., dissenting).

Appellants contend that their own almond advertising contains a mixture of commercial and political speech and

is therefore entitled to a higher level of protection under Riley v. National Fed'n of Blind, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). Riley addressed a First Amendment challenge to a North Carolina requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous twelve months that were actually turned over to charity. Id. at 795, 108 S.Ct. at 2676-77. The Supreme Court found the regulation unconstitutional under strict scrutiny. Id. at 798, 108 S.Ct. at 2678. The Court applied strict scrutiny because although the speech at issue was arguably commercial, and thus subject to a more deferential standard of review, "the speech [does not] retain[ ] its commercial character when it is inextricably intertwined with otherwise fully protected speech" — in that case, charitable solicitation. Id. at 796, 108 S.Ct. at 2677 (emphasis added).

In the present case, however, the commercial speech, although arguably "compelled," is not inextricably intertwined with higher-value noncommercial speech. Appellants' political appeals are not essential components of their advertisements. "[A]dvertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 n. 7, 105 S.Ct. 2265, 2274 n. 7, 85 L.Ed.2d 652 (quotation omitted). Thus, the Riley rationale for applying strict scrutiny is not present here.

3. Application of the Central Hudson test.

Once again, for the almond marketing program to be constitutional, (a) the asserted government interest behind it must be "substantial," (b) the program must "directly advance" that interest, and (c) the program must not be more extensive than necessary to serve that interest. Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351. USDA has the burden of justifying the program by presenting evidence sufficient to satisfy these requirements. Edenfield v. Fane, 507 U.S. 761, __, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993).

(a) Substantial government interest.

We "must identify with care the interests the State itself asserts." Edenfield, at __, 113 S.Ct. at 1798. USDA claims that the government has a "compelling and important interest in promoting the consumption of almonds" in order to "provide for greater stability in the products of agriculture" and "protect the income of farmers." Brief for the Appellee at 32. The Act itself states that the purpose of the creditable advertising program is to "assist, improve, or promote the marketing, distribution, and consumption of [almonds]." 7 U.S.C. § 608c(6)(I) (1988). See also 36 Fed.Reg. 20,887, 20,888 (1971) (the program will "provide an additional method of stimulating almond consumption"); 35 Fed.Reg. 7428, 7432 (1970) (the program will provide the "opportunity to stimulate the demand for almonds"). We agree that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest. See Frame,

885 F.2d at 1134 (government has a compelling interest in "maintaining and expanding beef markets" in order to "prevent[ ] further decay of an already deteriorating beef industry).

(b) Direct advancement of the interest.

Next, USDA must show that the program "directly advances the governmental interest asserted." Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351. "[T]he regulation[s] may not be sustained if [they] provide[ ] only ineffective or remote support for the government's purpose." Id. at 564, 100 S.Ct. at 2350. Furthermore, we may not simply defer to legislative and executive judgment on this question; we must determine ourselves whether the program directly advances USDA's asserted interests. City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 n. 22, 104 S.Ct. 2118, 2127 n. 22, 80 L.Ed.2d 772 (1984). We apply this test first to the creditable advertising regulations specifically, and then to the overall almond promotion program.

Because the Order forces each handler to fund Board promotional efforts with every assessment dollar not spent on creditable advertising, USDA must show both that the advertising for which credit is granted is better at selling almonds than the Board's own efforts and that the advertising for which credit is denied is worse at selling almonds than the Board's own efforts. As a starting point for our analysis, therefore, we must determine how effective the Board's own almond promotion efforts are. USDA has presented little solid evidence on this question. The following exchange, which occurred at the hearing before the ALJ between

counsel for Cal-Almond and Skip Hubbard, chairman of the Board's Public Relations and Advertising Committee, is highly instructive:

> Q: [H]as the Public Relations and Advertising Committee since you have been chairman, ever hired somebody to analyze whether or not the creditable advertising rules and the assessment amount spent on advertising, have caused more sales of almonds?
>
> A: It has not been — we have not ha[d] a survey conducted.
>
> Q: So would it be safe to say that you don't have any empirical data as to whether or not the advertising assessments have assisted in the . . . sale and consumption of almonds?
>
> A: No study has been made on that.
>
> Q: Has any study been made as to whether or not certain provisions of section 981.441 have created more sales or less sales than other provisions?
>
> A: We have not commissioned any study for that. [. . .]
>
> Q: [. . .] Has the Almond Board, the Public Relations and Advertising Committee, ever made a determination as to whether or not the advertising itself, or the promotion itself, done by the Board has increased grower returns?

A: The Committee believes that the promotional activities are beneficial to grower returns.

Q: [. . .] Has any study been conducted?

A: No.

Transcript of 1/25/90 hearing before USDA ALJ Hunt at 158-60.[6] Because USDA has presented little or no evidence regarding the effectiveness of the Board's promotional efforts, it cannot show that the creditable advertising regulations "directly advance" the government's interest in increased almond sales by enhancing the effectiveness of those efforts.[7] See Edenfield, 507 U.S. at __, 113 S.Ct. at

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6. Roger Baccigaluppi, the president and chief executive officer of Blue Diamond, testified that a professor at the University of California-Davis had conducted a study whose results demonstrated that the advertising program had been successful in increasing grower returns. However, this study is not part of the record.

7. USDA asserts that creditable advertising may "reasonably be expected to increase the sale of almonds," Brief for the Appellee at 31, and cites to the rule-making records underlying the regulations to support its assertion. However, these records address only minor amendments to the regulations made during the past decade, and not to the initial adoption of the bulk of the regulations, including the most restrictive ones. See, e.g., 49 Fed.Reg. 19,978 (May 10, 1984) (increasing the amount of credit handlers receive for advertising almond butter); 50 Fed.Reg. 16,451 (April 26, 1985) (doubling the portion of creditable advertising that may be carried over from one crop year to the next); 52 Fed.Reg. 13,427 (April 23, 1987) (allowing credit for the cost of purchasing mailing lists, envelopes and postage used in mail order promotions).

1800 (Florida Board of Accountancy fails to justify ban on personal solicitation of prospective business clients by accountants when it provides no studies or anecdotal evidence suggesting that such solicitation creates the asserted dangers of fraud, overreaching, or compromised independence).

In fact, most of the evidence in the record indicates that the regulations hinder the handlers' efforts to increase sales and returns to growers. For example, most of appellant Saulsbury's sales were to cereal companies, but Saulsbury could not receive credit for advertising the cereals containing its almonds because the regulations deny credit for products that do not contain at least 50 percent raw shelled almonds by weight and do not display the handler's brand. See 7 C.F.R. § 981.441(c)(3)(iv). When a chain of mini-markets in the Boise, Idaho area agreed to carry Saulsbury almonds, Saulsbury could not receive credit for advertisements directing consumers to those stores because the regulations deny credit for advertisements directing consumers to retail outlets not "operated" by a handler. See 7 C.F.R. § 981.441(c)(5)(iii). Because of these restrictions, Saulsbury estimated that every dollar spent on creditable advertising returned less than fifty cents in sales.

Cal-Almond's experience with the regulations was similarly disappointing. Cal-Almond exports approximately 90 percent of its almonds for use as ingredient items, and nearly all of the almonds it sells domestically are used in ice cream. However, like Saulsbury and cereal, Cal-Almond cannot obtain credit for advertising this ice cream because the regulations forbid it. The only creditable advertising of

any use to Cal-Almond is that promoting its mail order business, which is not a profitable undertaking.[8] Overall, the evidence indicates that the regulations hinder, rather than help, appellants' efforts to sell their almonds.

Finally, there is no evidence that the regulations stimulate additional or more effective advertising from other handlers. Blue Diamond is by far the largest handler and overwhelmingly dominates the retail market;[9] to "directly advance" the government interest in increasing almond sales, the regulations would have to give Blue Diamond an incentive to advertise more. The record indicates, however, that they do not. Roger Baccigaluppi, the president and chief executive officer of Blue Diamond, testified that Blue Diamond would "probably" continue to spend just as much money advertising even if the regulations did not exist. Walter Payne, Blue Diamond's vice president for sales, marketing and distribution, testified that Blue Diamond would advertise the same amount and in the same manner in the absence of the regulations.

In sum, the record indicates that the regulations do not stimulate additional or more effective advertising from Blue Diamond. Appellants have presented evidence showing that the regulations hinder their own marketing efforts, and USDA has presented no evidence that the regulations assist

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8. For example, in 1987 Cal-Almond spent nearly $300,000 advertising the business but its gross mail order sales were less than $100,000.

9. As of July 1987, Blue Diamond had a 92 percent share of almonds sold in grocery stores.

the efforts of other handlers. Therefore, we hold that the regulations do not "directly advance" the government's asserted interest in increased almond sales and are therefore an unconstitutional restriction on appellants' First Amendment rights.

Whether the entire assessment-funded almond promotion program "directly advances" the governmental interests in increased almond sales and returns to growers is a more difficult question. The Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised. See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 342, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986) ("[w]e think [that] the legislature's belief [that advertising of casino gambling would serve to increase the demand for the product advertised] is a reasonable one"); Central Hudson, 447 U.S. at 569, 100 S.Ct. at 2353 ("[t]here is an immediate connection between advertising and demand for electricity."). Therefore, we may reasonably assume that the Board's promotional efforts have some positive effect on almond demand (although, as noted above, the Board does not know how significant the effect is).

However, because these efforts are funded with money that handlers would presumably have spent on their own advertising, we cannot compare the Board's program with a no-advertising situation; we must compare it to a situation where handlers spent their assessments on their own marketing. USDA has presented no evidence tending to show that the generic Board promotion financed by that money sells almonds more effectively than the specific, targeted

marketing efforts of individual handlers.[10] We agree with appellants' argument that each handler knows best how to sell his own almonds; we are unwilling to presume, in the absence of hard evidence to the contrary, that a government agency is better at marketing than an individual businessperson. The USDA has failed to meet its burden of showing that the overall almond marketing program "directly advances" its stated goals of selling more almonds and increasing returns to producers.[11]

(c) Not more extensive than necessary.

USDA must prove that the regulations are no more extensive than necessary to serve the interest of increasing almond sales. The Supreme Court held in Board of Trustees of State Univ. v. Fox that this standard is not as strict as a "least restrictive means" test:

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10. Once again, appellants have presented evidence to the contrary. Cloyd Angle, the president of Cal-Almond, testified that the best way for him to sell almonds is to bring potential customers to his plant and show them the cleanliness and efficiency of his processing facilities. Spending money on generic Board promotion does not help him do this.

11. The Frame majority held that mandatory assessments to the Cattlemen's Board advanced the goals of the Beef Promotion Act because they "prevent[ed] 'free riders' from receiving the benefits of the promotion and research program without sharing the cost." Frame, 885 F.2d at 1135. USDA could make a similar argument here (although it has not). Such a conclusion, however, presumes that the promotion itself advances the goals of the Act, a presumption that we have rejected.

> What our decisions require is a fit between the legislature's ends and the means chosen to accomplish those ends — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. 492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989).

USDA asserts that "[a]lthough it is possible that some forms of advertising, though ineligible for credit, might also increase the sale of almonds, the regulations reflect a reasonable judgment that the Board will make better use of those monies in its market promotion programs." However, once again, USDA offers no evidence in support of this "reasonable judgment." It certainly seems reasonable to assume that the advertisements for which credit is explicitly permitted — generic advertisements, expenditures for advertisements announcing future promotion activities, and in-store supermarket advertisements — will increase almond sales. However, USDA offers no justifications for the restrictions that deny credit for certain advertisements: ads promoting more than two complementary branded products (§ 981.441(c)(5)(i)), ads promoting a product that also has "competing nuts" (§ 981.441(c)(5)(ii)), or ads promoting retail stores not owned by handlers (§ 981.441(c)(5)(iii)). It is true that the fit between means and ends need not be perfect, but there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates

the retail almond market, at the expense of smaller handlers such as appellants, who sell primarily to ingredient manufacturers. This court has interpreted Fox as holding that "restrictions which disregard far less restrictive and more precise means are not narrowly tailored." Project 80's, Inc. v. City of Pocatello, 942 F.2d 635, 638 (9th Cir.1991). The creditable advertising regulations disregard such means, and therefore are more extensive than necessary to serve the interest of increasing almond sales. As the USDA has failed to present sufficient evidence to satisfy the requirements of the Central Hudson test, the Almond Marketing Program violates appellants First Amendment rights.

II. THE ASSESSMENT IMPOSITION PROCEDURES

A. Facts and proceedings below.

As noted above, the funds required to finance the Board's activities are generated through assessments authorized by the Act. The Order specifically provides that the assessment shall be "such rate per pound of almonds . . . received by [the handler] for his own account . . . as the Secretary finds is necessary to provide funds to meet the authorized [B]oard expenses and the operating reserve requirements." 7 C.F.R. § 981.81(a) (1993).

For the crop years 1980 through 1986, USDA issued final rules containing budget estimates and assessment rates without first publishing a proposed rule and requesting comments. Appellants contend that this procedure violated the rule making requirements of the Administrative

Procedure Act (APA), which requires "[g]eneral notice of proposed rule making . . . unless persons subject thereto are named and either personally served or otherwise have actual notice thereof." 5 U.S.C. § 553(b) (1988) (the "notice" requirement). The agency is also required to give "interested persons an opportunity to participate in the rule making" (the "comment" requirement) and "[a]fter consideration of the relevant matter presented . . . incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (1988). In addition to the time required for the notice-and-comment procedure, an additional thirty days must pass between the time the final rule is passed and the time it takes effect. 5 U.S.C. § 553(d) (1988).

Following appellants' administrative challenges to the assessment imposition procedure,[12] the ALJ found that notice and comment pursuant to the APA should have been allowed. The JO disagreed and ruled that "good cause" existed for dispensing with notice and comment because the Secretary had discretion to authorize such expenses as were reasonable and likely to be incurred and because arriving at the assessment rate was a ministerial and mechanical calculation. The district court agreed with the JO.

B. Discussion.

1. Notice and comment.

We review de novo "the district court's determinations on issues of statutory interpretation, including the scope of

12. Outlined in section I.A. above.

the notice-and-comment and publication requirements imposed by the APA." Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1011 (9th Cir.1987). We hold that although the assessments are "rules" subject to the notice-and-comment requirement of the APA, the Secretary's failure to give notice and request comments was harmless.

The APA defines a "rule" as

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates.

5 U.S.C. § 551(4) (1988) (emphasis added). We agree with appellants that establishing an assessment is a "prescription for the future of rates." The Order itself defines the assessment as a "rate per pound of almonds." 7 C.F.R. § 981.81(a) (1993). USDA's argument that the assessment procedure is not a rule because it is simply the mechanical result of the Secretary's approving an agency's budget fails under the D.C. Circuit's opinion in Batterton v. Marshall, 648 F.2d 694 (D.C.Cir.1980). There, the court held that the exemption for budgetary approval does not apply "where the agency action trenches on substantial private rights and interests." Id. at 708 (footnote omitted). Because the assessment rate directly affects the financial interests of appellants and other almond handlers, it is not exempt from the notice-and-comment requirements of the APA.

Appendix F

The district court held that the Secretary's failure to follow the notice-and-comment procedure was excused by the "good cause" exception to the APA, which excuses such failure

> when the agency for good cause finds (and incorporates the finding and a brief statement of reasons thereof in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b)(B) (1988) (emphasis added). The announcement accompanying the rules provided the following justification for dispensing with the notice-and-comment procedure:

> To enable the Board to meet crop year obligations, approval of the expenses and assessment rate is necessary without delay. Handlers and other interested persons were given an opportunity to submit information and views on the expense and assessment rate at an open meeting of the Board. To effectuate the declared purposes of the [A]ct it is necessary to make these provisions effective as specified.

45 Fed.Reg. 56,794 (1980). USDA contends that since the Board's annual harvest forecast and proposed budget both depend on crop projections for that year, the formulation of a recommended budget and assessment rate cannot be accomplished early enough to allow for both notice and

comment and the postponement of the effective date of the rule until 30 days after publication, as required by the APA.[13]

We disagree, based on our opinion in Riverbend Farms Inc. v. Madigan, 958 F.2d 1479 (9th Cir.), cert. denied, 506 U.S. 999, 113 S.Ct. 598, 121 L.Ed.2d 535 (1992). In Riverbend Farms, handlers of navel oranges challenged the procedure used by the Secretary to set weekly volume restrictions on the marketing of the oranges. We first noted that

> the good cause exception goes only as far as its name implies: It authorizes departure from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission. The agency thus must minimize conflict with the APA by complying with those APA requirements it is capable of complying with.

Id. at 1485. We then held that even though the volume-setting meetings were conducted weekly, the Secretary had no reason not to give notice of them (by means of publication in the Federal Register) or allow written comments before promulgating weekly volume restrictions. Id. at 1486. Because we found no reason in Riverbend Farms to depart from the notice-and-comment procedure for weekly meetings and rules, we can discern no good cause here for the Secretary's failure to follow the procedure for annual meetings and rules.

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13. The Board recommended assessment rates at the annual July meeting. However, in the years from 1980 to 1986, the earliest the Secretary issued the final rule was August 26 in 1980, and the latest was October 19 in 1982.

We also cannot find good cause for the failure to wait thirty days before allowing the rule to take effect. In Riverbend Farms, we noted two reasons for the waiting period: it gives affected parties time to adjust their behavior before the final rule takes effect, and it usually causes no harm. Id. at 1485. These reasons apply to the almonds context. From 1980 to 1986, delaying the effective date of the rules by thirty days would have caused no harm, because the Secretary always waited at least thirty days before adopting a final rule anyway. Furthermore, the thirty days would have given handlers an opportunity to estimate their future costs and prices before the rule went into effect. Therefore, we can see no reason not to follow this requirement, and hold that the Secretary has failed to provide good cause for his failure to follow the procedure mandated by the APA.

However, we find this failure to be harmless. "We have held that the failure to provide notice and comment is harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.' " Riverbend Farms, 958 F.2d at 1487 (quoting Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760, 764-65 (9th Cir.1986)). Our harmless error analysis "must therefore focus on the process as well as the result." Id. (emphasis added). In Riverbend Farms, we ultimately concluded that the Secretary's failure to comply with the APA's notice-and-comment requirements in promulgating the weekly navel orange volume restrictions was harmless because the handlers knew that there would be meetings every Tuesday, that proposed restrictions would be contained in a position paper issued prior to the meetings, and that the meetings

would provide the opportunity for public comment. Therefore, the handlers were not prejudiced by the Secretary's failure to follow the notice and comment procedure, and the error was harmless. Id. at 1488.

The Secretary's error in the instant case is harmless for the same reasons. The Board holds open meetings in July of each year to gather information relevant to estimating its budget and the resulting assessment rate. During these meetings, the Board receives comments and testimony from any and all interested parties. After deciding on its recommendations, the Board directly notifies each almond handler of the proposed assessment rate. The Board then submits its recommendations to the Secretary for approval; from 1980 to 1986, the assessment rate set by the Secretary in the final rule was the same as the rate that had been recommended by the Board. Therefore, under Riverbend Farms, any error made by the Secretary in not following the notice and comment procedure was harmless.

2. Validity of allegedly "retroactive" assessments.

From 1980 to 1986, the final rules establishing the annual assessments were not issued by the Secretary until at least several weeks after the beginning of the crop year. However, appellants had by that time already received a significant quantity of almonds, and the assessments were applied to those almonds as well. Appellants claim that doing so transformed the assessments into impermissible "retroactive" rules.

Appendix F

The Supreme Court has noted that administrative rules must be statements that have legal consequences only for the future. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 217, 109 S.Ct. 468, 476, 102 L.Ed.2d 493 (1988) (Scalia, J., concurring). "Retroactive" rules — those that alter the past legal status of past actions — are "not favored in the law." Id. at 208, 109 S.Ct. at 471. However, they are permitted if the power to promulgate them "is conveyed by Congress in express terms." Id. (emphasis added).

We agree with the district court that even if the assessments are retroactive rules, Congress expressly granted the Secretary the power to promulgate them. The Act provides that handlers shall pay assessments for such expenses "as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him." 7 U.S.C. § 610(b)(2)(ii) (1988). Since the Order specifies the crop year to be the relevant "period," the Secretary may impose the assessment on all almonds received during that time. As the district court pointed out,

> [t]he statutory language of Section 610(b)(2)(ii) mandates that each handler's pro rata share of the Almond Board's expenses must be based on the volume of all of the commodity covered by the marketing order. The focus of the statute is on the 'expenses likely to be incurred . . . during any period specified by [the Secretary].' The period specified by the Secretary is the crop year July 1 through June 30. Therefore, the statute requires a

handler to share pro rata in any expenses likely to be incurred by the Almond Board during a crop year.

We hold that even if the assessment rules are "retroactive," they are permissible because they were authorized by Congress in the Act.

3. Statement of basis and purpose.

Appellants contend that the final 1980-1986 assessment rules failed to comply with the substantive requirements of the APA because they did not include a "general statement of their basis and purpose" as required by 5 U.S.C. § 553(c). However, regulations with no statement of basis and purpose have been upheld where the basis and purpose was considered obvious. See Citizens to Save Spencer County v. E.P.A., 600 F.2d 844, 884 (D.C.Cir.1979). This is just such a case. The "purpose" of the assessment is clearly to fund the Board's operations, and the "basis" of the rate is the mechanical application of the statutory formula. Because the basis and purpose of the assessment rate are obvious, no express statement was necessary to comply with the APA.

III. THE RESERVE REQUIREMENTS

A. Facts and proceedings below.

The reserve requirement is the mechanism the Board uses to regulate the volume of almonds entering the market, pursuant to the Act's goals of protecting almond prices and maintaining an orderly flow of almonds to market. 7 U.S.C.

§ 608c(6)(A), (C) (1988). Every year, the Board recommends to the Secretary what percentage of the total almond crop should be "salable" and what percentage should be held in "reserve" by handlers. 7 C.F.R. § 981.49 (1993). Handlers may only sell the salable percentage of almonds they receive; they must withhold from marketing an amount equal to the reserve percentage. 7 C.F.R. § 981.50 (1993). The Secretary designates the final percentage based on the Board's recommendation and "any other available information." 7 C.F.R. § 981.47 (1993).

The almond crop year begins on July 1 and ends June 30. 7 C.F.R. § 981.19 (1993). For the 1988 crop year, the Board recommended a 25 percent reserve requirement on July 20, 1988; the Secretary issued a proposed rule incorporating this recommendation on September 16, 1988, allowing 15 days for comment; and issued the final rule establishing the 25 percent reserve requirement on January 25, 1989. For the 1990-91 crop year, the Board recommended a 35 percent reserve requirement; the Secretary issued a proposed rule on August 10, 1990, with the same 15-day comment period; and the Secretary issued the final rule on September 21, 1990.

Appellants Cal-Almond, Gourmet Packing, and Gold Hills filed administrative petitions, pursuant to 7 U.S.C. § 608c(15)(A), challenging the lawfulness of the procedures used by the Secretary to establish the 25 percent reserve requirement for the 1988-89 crop year; the validity of certain actions that the Board and Secretary require handlers to take to comply with the reserve requirement; and the validity of

Secretary's imposing assessments on reserve almonds. After consolidation, the ALJ rejected most of the challenges, but held that the 1988-89 reserve and assessment rules were invalidly retroactive. On appeal, the JO upheld the Secretary's actions in all respects and the district court did the same.

Appellants Cal-Almond and Gold Hills had also filed an administrative petition challenging various USDA actions under the Order for the crop year 1990-91. The ALJ rejected their challenges and the JO affirmed. After appellants filed suit in district court, the parties stipulated that the district court should grant summary judgment for USDA without prejudice to appellants' right to appeal, which the district court did. Appellants appeal both judgments.

B. Discussion.

1. Lawfulness of 1989-90 and 1990-91 reserve obligation rules.

(a) Retroactivity.

Appellants claim that the 1988-89 and 1990-91 reserve obligation rules were unauthorized retroactive rules. We hold that even if the rules were retroactive, they were expressly authorized by Congress and were therefore valid. Georgetown Univ. Hosp., 488 U.S. at 208, 109 S.Ct. at 471-72. The Act provides that marketing orders may contain terms

> [a]llotting, or providing methods for allotting, the amount of [a] commodity . . . which each handler may market . . . under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity . . . to be marketed . . . during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

7 U.S.C. § 608c(6)(C) (1988). The focus of the statute is on the total quantity of almonds to be marketed during any period specified by the Secretary — in this case, the July 1 – June 30 crop year. The statute requires the total quantity of almonds salable during this period to be allotted "equitably" among the handlers. To do so, the Secretary has to take into account almonds shipped between the beginning of the crop year and the issuance of the final reserve rule. Thus, the reserve obligation rules, even if retroactive, are authorized by the Act.

(b) Arbitrariness.

We may set aside an agency's decision if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Citizens for Clean Air v. E.P.A., 959 F.2d 839, 844 (9th Cir.1992) (quotation omitted). Appellants contend that the final 1988-89 reserve obligation rule was arbitrary and capricious because it was issued after

undue delay. The Board recommended the 25 percent reserve obligation on July 20, 1988. The Secretary issued a proposed rule on September 16, 1988, but did not issue a final rule until January 25, 1989, over four months later, and seven months into the crop year. According to appellants, the most active times for almond sales are in late summer and early fall; consequently, appellants argue, it was arbitrary and capricious for the Secretary to have waited until well after this time had passed to issue a final reserve obligation rule.

However, appellants have cited no cases, and we have found none, holding that an agency's delay in issuing a rule makes the rule itself arbitrary or capricious. Therefore, although the delay was certainly unfortunate and should be avoided in the future, it was not arbitrary or capricious.[14]

Appellants also contend that the 1988-89 and 1990-91 reserve obligation rules were arbitrary and capricious because they did not include a sufficient statement of basis and purpose as required by 5 U.S.C. § 553(c). We disagree. In the 1988-89 rule, USDA set out its calculations of supply and demand for California almonds and explained why a 25 percent reserve obligation was necessary:

> While this rule may restrict the amount of almonds which handlers may sell in normal domestic and expert markets, the salable and reserve

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14. The cases cited by appellants address the adequacy of agency explanations of the contents of their rules, not the delays in promulgating them. See, e.g., North Germany Area Council v. Federal Labor Relations Auth., 805 F.2d 1044 (D.C.Cir.1986); Celcom Communications Corp. v. F.C.C., 789 F.2d 67 (D.C.Cir.1986).

> percentages are needed to lessen the impact of the projected oversupply situation facing the industry and to promote stronger marketing conditions, thus avoiding unreasonable fluctuations in prices and supplies and improving grower returns. The reserve percentage is designed to reduce the oversupply situation in the industry in the 1988-89 crop year by holding off the market a percentage of the available almonds that could be added to an already fully supplied market. If the reserve were zero and all available California almonds were salable, almond prices, in a market which already has record supplies on hand, would be expected to drop in both domestic and foreign markets. Thus, the Board's recommendation for a 25 percent reserve is designed to effectuate the purposes of the Act by avoiding unreasonable fluctuations in supplies and prices.

54 Fed.Reg. 3584 (1989). A similar statement was included for the 1990-91 reserve obligation rules. See 55 Fed.Reg. 38,793, 38,794 (1990). Both statements explain the rules' basis (almond supply and demand estimates) and purpose (avoiding unreasonable fluctuations in supplies and prices).

Furthermore, USDA addressed the primary comments on the proposed reserve obligations that were made during the 15-day notice and comment period, such as objections to the crop size estimates, demand estimates, and reserve obligation size. See 54 Fed.Reg. 3584, 3585-87 (1989);

55 Fed.Reg. 38,793, 38,794-97 (1990).[15] The rules thus satisfied the requirement that they "indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did." Independent United States Tanker Owners Comm. v. Dole, 809 F.2d 847, 852 (D.C.Cir.), cert. denied, 484 U.S. 819, 108 S.Ct. 76, 98 L.Ed.2d 39 (1987).

Finally, appellants claim that the reserve obligation rules were arbitrary and capricious because USDA did not follow the dictates of Departmental Regulation (DR) 1512-1 in promulgating them. We have no authority to review appellants' challenge, because section 1 of DR 1512-1 states that "[t]his directive . . . is not intended to create any right

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15. The following example is illustrative:

> Many commenters who opposed the 35 percent reserve indicated that there is an over production of California almonds and that holding almonds in reserve this year will add to the surplus in following years. Over the past decade, however, annual marketable production has failed to meet trade demand needs for the 1983-84, 1985-86, 1986-87, and 1989-90 crop years. Given the wide swings in production from year to year which characterize the almond industry, it is possible that the 1991 crop could fall short of 1991-92 trade demand needs. If early projections of the 1991 crop indicate that this would likely be the case, an appropriate quantity of 1990-91 crop year reserve almonds would be released to the salable category to augment 1991-92 crop year supplies.

55 Fed.Reg. 38,793, 38,794 (1990).

or benefit, substantive or procedural, enforceable at law by a party against the Department, its agencies, its officers or employees or any other person." See Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir.1986) (this language evinces "clear and unequivocal intent that agency compliance with Executive Order 12,291 not be subject to judicial review").

2. 1990-91 agency agreements for reserve almond disposition.

A handler has two alternatives for disposing of reserve almonds. First, the handler may turn them over to the Board, which has the "power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable." 7 C.F.R. § 981.66(a) (1993). The Board then distributes the proceeds from such disposition to the handlers on a pro rata basis. 7 C.F.R. § 981.66(g) (1993). Alternatively, the handler may obtain authorization from the Board to act as the Board's agent in disposing of the reserve; all agents so authorized must sign agency agreements with the Board which contain "such reasonable terms and conditions, including inspection and certification requirements, as the Board may specify". 7 C.F.R. § 981.67 (1993).

The agency agreements for the crop year 1990-91 contained a provision stating: "If established by the Secretary, minimum prices will apply to reserve almonds diverted to eligible outlets . . . Agents will be notified of any such minimum price schedule established." Appellants contend that because the agency agreements include this provision, they violate both the Act and the APA.

Appendix F

(a) Agency agreements and the Act.

Appellants claim that the minimum price provision violates the Act because the Act forbids the fixing of prices with respect to almonds. This is incorrect; the Act is silent regarding whether agricultural marketing orders may set the prices that handlers receive from their customers.[16] The Act does state that almond marketing orders may provide for the establishment of reserve pools of almonds and provide "for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein." 7 U.S.C. § 608c(6)(E) (1988). The Almond Marketing Order further provides that "[t]he Board shall have power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable." 7 C.F.R. 981.66(a) (1993) (emphasis added). Because including minimum price provisions in agency agreements is consistent with this mandate, we hold that the agreements do not violate the Act.

(b) Agency agreements and the APA.

Appellants contend that the minimum price provision was an "additional regulation" requiring the Secretary to follow the APA's notice-and-comment procedure before

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16. Appellants quote our observation in Pescosolido v. Block, 765 F.2d 827 (9th Cir.1985), that "the Secretary is not empowered to fix prices for any [commodities other than milk] covered by the Act." Id. at 830. Pescosolido is inapplicable to the present case because it dealt with the prices that handlers pay to producers, not the prices that handlers receive from their customers.

adopting the agency agreements.[17] Appellants cite American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C.Cir.1987), in support of their argument. In American Hosp. Ass'n, the D.C. Circuit addressed the issue of whether the Department of Health and Human Services (HHS) had to subject certain of its contracts to APA notice and comment. As part of the Medicare program, HHS was required to contract with "peer review organizations" (PROs), private organizations of doctors that would monitor the professional activities of Medicare service providers in their areas. Id. at 1041. Congress granted HHS great discretion to contract with each PRO as it saw fit, in order to tailor the service review process to local needs. Id. at 1053. The statute provided specifically that

> Contracting authority of the Secretary under this section may be carried out without regard to any provision of law relating to the making, performance, amendment or modification of contracts of the United States as the Secretary may determine to be inconsistent with the purposes of this part.

Id. (quoting 42 U.S.C. § 1320c-2(e)). The D.C. Circuit held that this statutory language exempted HHS only from "the

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17. Agency agreements are contracts, and the APA does not apply to matters "relating to agency management or personnel or to public property, loans, grants, benefit, or contracts." 5 U.S.C. § 553(a)(2) (1988) (emphasis added). In 1971, however, USDA promulgated a regulation making the APA's procedural requirements applicable to all of its rule making relating to contracts. 36 Fed.Reg. 13,804 (1971).

vast corpus of laws establishing rules regarding the procurement of contracts from the government," and did not exempt HHS from the "general restraints" of the APA. Id. at 1054. More specifically, the language did not "restor[e] a broad exemption from all APA requirements that would allow HHS on its own to modify vitally important provisions of peer review." Id. The court found that since Congress had granted HHS very broad discretion to implement the peer review program through individualized contracts with PROs, the danger of HHS' "legislating" the program through contractual terms was too high unless those terms were subject to APA notice and comment. Id. The court concluded that "any contract provisions that are legislative are subject to § 553's notice and comment requirements." Id. (emphasis added).

We find the agency agreements to be distinguishable from the PRO agreements at issue in American Hosp. Ass'n. There, the central mechanism for implementing the entire peer review program was the PRO contracts, because Congress had mandated that HHS enter into such a contract with a PRO in each area. Thus, there was a real danger that HHS would assume the role of unelected legislative body and promulgate statutory law under the guise of PRO contract terms. Here, by contrast, the agency agreements are incidental to the administration of the Order; they simply give handlers another, perhaps preferable, option for disposing of their reserve almonds. Unlike the program at issue in American Hosp. Ass'n, USDA is not required to enter into agreements with handlers, nor is any individual handler required to enter into an agreement with USDA. Because the agreements are incidental to the entire program,

and because handlers have another option, there is little danger that USDA will legislate through agency agreements.

Furthermore, even if the agency agreements did raise the dangers identified in American Hosp. Ass'n, the only provision that appellants specifically object to — the minimum price provision — is not "legislative" and thus would not be subject to APA procedures. The Act grants the Secretary the power to "provid[e] for the equitable distribution of the net return derived from the sale [of the reserve pool] among the persons beneficially interested therein." 7 U.S.C. § 608c(6)(E) (1988). We held above that a minimum price provision is a legitimate means of enforcing this requirement; the provision is thus a "procedural" rule exempt from the APA's requirements. See American Hosp. Ass'n, 834 F.2d at 1055 ("procedural" rules, those that are "legitimate means of structuring [the agency's] enforcement authority," are exempt from the APA notice and comment requirement).

3. Restrictions on handlers' disposition of reserve almonds.

(a) Reserve almond storage requirements.

During the 1988-89 crop year, the Board informed handlers that their reserve almonds had to be stored in California. The Board instituted this requirement without following the procedural rule making requirements of the APA. Appellants argue that the California storage rule is a substantive rule that could have been promulgated only through compliance with the APA.

The Order grants the Board the power to "receive, investigate and report to the Secretary complaints of violations of [the Order]." 7 C.F.R. § 981.38 (1993). To aid the Board in exercising this power, the Order also provides that "[e]ach handler's premises shall be accessible to authorized representatives of the Board and the Secretary for examination and audit of [certain] records and for inspection and observation of almonds." 7 C.F.R. § 981.70 (1993). The California storage rule helped ensure such accessibility and was thus a "legitimate means of structuring [the agency's] enforcement authority." American Hosp. Ass'n, 834 F.2d at 1055. We hold that the California storage requirement, like the minimum price provision, was a "procedural" rule exempt from the APA notice-and-comment requirement.[18]

(b) Future sales contracts for reserve almonds.

The Order prohibits the "handling" of reserve almonds. 7 C.F.R. § 981.50 (1993). The Order defines "to handle" as "to sell" or "to put into channels of trade." 7 C.F.R. § 981.16 (1993). In December 1988 USDA sent out a letter stating that it considered a contract for the disposition of reserve almonds entered into before the release of the reserve to be a "sale" and thus a prohibited act of "handling." Effectively, then, USDA prohibited handlers from entering into contracts to sell reserve almonds.

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18. While storing almonds in California may have inconvenienced appellants, the mere fact that a rule may have a substantial impact "does not automatically transform it into a legislative rule." State ex rel. State Water Resources Control Bd. v. Federal Energy Regulatory Comm'n, 966 F.2d 1541, 1554 (9th Cir.1992) (quotation omitted).

Appellants contend that this letter was a rule that should have been promulgated pursuant to the notice-and comment requirements of the APA. However, "interpretive" rules — "those which merely clarify or explain existing law or regulations" — are exempt from these requirements. Linoz v. Heckler, 800 F.2d 871, 877 (9th Cir.1986) (quotation omitted); 5 U.S.C. § 553(b)(A) (1988). USDA's prohibition on the pre-release sale of reserve almonds is just such a rule, because it interprets the Order's prohibition on the handling of reserve almonds. The rule is therefore exempt from APA notice and comment.

4. Assessments on reserve almonds.

USDA currently imposes assessments on the total quantity of almonds received by handlers, including those in the reserve. Appellants contend that both the Act and the Order prohibit USDA from doing so.

We disagree. The Act states that each handler shall be assessed pro rata for reasonable Board expenses

> other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order.

7 U.S.C. § 610(b)(2)(ii) (1988) (emphasis added). Appellants argue that the Board does not dispose of the reserve almonds "for the benefit of" the handlers and that therefore the Board

cannot impose assessments on those almonds to cover the expenses of doing so. However, the proceeds from the Board's disposition of a handler's almonds are turned over to the handler. 7 U.S.C. § 608c(6)(E) (1988); 7 C.F.R. § 981.66(g) (1993). The reserve almonds are therefore disposed of "for the benefit" of the handlers, and the Board may consequently impose assessments on them.

We also reject appellants' contention that the Order prohibits the imposition of assessments on reserve almonds. The Order states that a handler shall only be assessed on almonds "received by him for his own account." 7 C.F.R. § 981.81(a) (1993). All reserve almonds are originally "received" by handlers for their own account, and thus subject to assessment. Only after being received by handlers are a certain percentage of almonds then "held" for the account of the Board. Even then, they are not really held for the account of the Board in the sense of the Board's receiving the proceeds from the disposition thereof, because the handlers get those proceeds. This terminology and regulatory structure is admittedly somewhat ambiguous, but "where Congressional intent is ambiguous, courts should defer to a reasonable agency interpretation of a statutory scheme the agency is entrusted to administer." Railway Labor Executives' Ass'n v. I.C.C., 958 F.2d 252, 256 (9th Cir.1991). We defer to USDA's reasonable interpretation of the Order.

Appendix F

IV. THE ADMINISTRATIVE REMEDY PROCEDURE

Appellants finally contend that the long and tortuous path they have had to follow to exhaust their claims violates their right to due process. While we understand appellants' frustration with the administrative remedy procedure, we must also reject their argument. Appellants claim that the procedure does not provide petitioners with a "clear and certain remedy;" however, we have already held that a sufficient remedy for handlers who prevail in their administrative petitions is a refund of any assessments found not to have been due. Saulsbury Orchards, 917 F.2d at 1195 (quoting Navel Orange Admin. Comm. v. Exeter Orange Co., 722 F.2d 449, 452 (9th Cir.1983)).[19] As for the amount of time appellants have spent pressing their claims, we agree with the district court's reasoning that

> [w]hile there is no question that completion of the administrative process in connection with this Section 15(A) petition was very lengthy, it is also apparent that some of the delay resulted from the

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19. Contrary to appellants' contention, the Supreme Court's holding in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), does not require the remedy to consist of compensatory damages. The Court held only that an appropriate remedy for taxes unlawfully collected from plaintiff could either be a refund of taxes unlawfully collected or an assessment and collection of back taxes from the plaintiff's competitors. Id. at 40, 110 S.Ct. at 2252. McKesson never held that compensatory damages were required; it held only that a refund of unlawful taxes was one possible way for the State to satisfy the requirements of the Due Process Clause.

> sheer number and magnitude of the issues raised in the petition as well as from the litigation tactics adopted by plaintiffs . . . [T]he court thinks it unrealistic of plaintiffs to expect prompt resolution of the quality and quantity of issues raised herein.

The length of the proceedings, although certainly regrettable, was not a denial of due process.

V. CONCLUSION

We affirm the judgments for USDA on all issues except the almond marketing program, which we find to violate the First Amendment. We are now faced with the question of what remedy to grant to appellants. Appellants request a full refund of the assessments imposed upon them from 1980 to the present, as well as attorneys' fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. Because of the fact-intensive nature of the inquiry, we find that "[t]he determination of the appropriate remedy in this case is a matter that should be addressed in the first instance by the District Court." Chicago Teachers Union v. Hudson, 475 U.S. 292, 310, 106 S.Ct. 1066, 1078, 89 L.Ed.2d 232 (1986). See also Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). The case is remanded for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED NOVEMBER 12, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16921

D.C. No. CV-98-05049-REC/SMS

CAL-ALMOND INC.; GOLD HILLS NUT COMPANY INC.; FRAZIER NUT FARMS, INC.; BAL NUT INC.; CENTRAL VALLEY GROWER PACKING; HOCKER NUT FARM; JARDINE ORGANIC RANCH; ROTTEVEEL ORCHARDS; THERON SHAMOCHIAN INC.; BEARDS QUALITY NUT CO.; AMARETTO ORCHARDS; CARLSON FARMS,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

Before: REINHARDT, O'SCANNLAIN, and W. FLETCHER, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing and to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX H — RELEVANT STATUTES

7 U.S.C. § 608a(6)

§ 608a. Enforcement of chapter

(6) Jurisdiction of district courts

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.

* * *

7 U.S.C. § 608c(1)-(4), (6), (7) and (15)

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as in the current of interstate or foreign commerce, or which directly

burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans, and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops,

honeybees, and naval stores as included in the Naval Stores Act [7 U.S.C.A. § 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin): Provided, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys and not excepting poultry which produce commercial eggs), fruits and vegetables for canning or freezing, including potatoes for canning, freezing, or other processing and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the

total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and

sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

* * *

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during

any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products, in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that

acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding clause (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: Provided, however, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i);

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense

of such projects to be paid from funds collected pursuant to the marketing order: Provided, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocadoes, apples, raisins, walnuts, tomatoes, or Florida-grown strawberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: Provided further, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

Appendix H

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: Provided, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

* * *

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the

Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

* * *

Appendix H

7 U.S.C. 608c(6)(I)

§ 608c. Orders regulating handling of commodity

* * *

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

* * *

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: Provided, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocadoes, apples, raisins, walnuts, tomatoes, or Florida grown strawberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as

hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . .

* * *

7 U.S.C. § 608c(10)

Manner of regulation and applicability

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

* * *

Appendix H

7 U.S.C. § 610(b) and (c)

§ 610. Administration

* * *

(b) State and local committees or associations of producers; handlers' share of expenses of authority or agency

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

(2)(i) Each order relating to milk and its products issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency,

other than expenses incurred in receiving, handling, holding, or disposing of any quantity of milk or products thereof received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of milk or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers.

(ii) Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. The payment of assessments for the maintenance and functioning of such

authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

(iii) Any authority or agency established under an order may maintain in its own name, or the name of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several district courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) Regulations; penalty for violation

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this chapter. Any violation of any regulations shall be subject to such penalty, not in excess of $100, as may be provided therein.

* * * *

APPENDIX I — RELEVANT POST-1993 ALMOND MARKETING ORDER REGULATIONS

7 C.F.R. § 981.30

ALMOND BOARD OF CALIFORNIA

§981.30 Establishment.

A Board of ten members, with an alternate member for each such member, is hereby established.

7 C.F.R. § 981.31

§981.31 Membership representation.

Membership of the Board will be determined in the following manner:

(a) Two members and an alternate for each member shall be selected from nominees submitted by each of the following groups designated in paragraphs (a)(1) and (2) of this section, or from among other qualified persons belonging to such groups:

(1) Those growers who market their almonds through cooperative handlers; and

(2) Those growers who market their almonds through other than cooperative handlers.

(b) Two members and an alternate for each member shall be selected from nominees submitted by each of the following groups designated in paragraphs (b)(1) and (2) of

this section, or from among other qualified persons belonging to such groups:

(1) Cooperative handlers; and

(2) All handlers, other than cooperative handlers.

(c) One member and an alternate shall be selected from nominees submitted by each of the following groups designated in paragraphs (c)(1) and (2) of this section, or from among other qualified persons belonging to such groups:

(1) The group of cooperative handlers or the group of handlers other than cooperative handlers, whichever received for their account more than 50 percent of the almonds delivered by all growers as determined by December 31 of the then current crop year; and

(2) Those growers whose almonds were marketed through the handler group identified in paragraph (c)(1) of this section.

* * *

7 C.F.R. § 981.38

§981.38 Powers.

The Board shall have the following powers:

(a) To administer the provisions of this part in accordance with its terms;

(b) To make rules and regulations to effectuate the terms and provisions of this part;

(c) To receive, investigate and report to the Secretary complaints of violations of this part; and

(d) To recommend to the Secretary amendments to this part.

7 C.F.R. § 981.39

§981.39 Duties.

The Board shall have, among other things, the following duties:

(a) To act as intermediary between the Secretary and any handler or grower;

(b) To keep minute books and records which will clearly reflect all of its acts and transactions, and such minute books and records shall be subject to examination by the Secretary at any time;

(c) To investigate the growing, shipping, and marketing conditions with respect to almonds and to assemble data in connection therewith;

(d) To furnish to the Secretary such available information as may be deemed pertinent or as he may request;

(e) To appoint such employees as it may deem necessary and to determine the salaries, define the duties and fix the bonds of such employees; and

(f) To cause the books of the Board to be audited by one or more competent certified public accountants at least once for each crop year, and at such other times as the Board may deem necessary or as the Secretary may request; and the report of each such audit shall show, among other things, the receipt and expenditure of funds pursuant hereto: and to file with the Secretary three copies of all audit reports made.

7 C.F.R. § 981.40(a), (d) and (e)

§981.40 Procedure.

(a) *Organization and rules.* The members of the Board shall select a chairman from their membership. The Board shall select such other officers and adopt such rules for the conduct of its business as it may deem advisable. The Board shall give to the Secretary or his designated agent and representatives the same notice of meetings of the Board as is given to members of the Board.

* * *

(d) *Right of the Secretary.* The members of the Board (including successors or alternates), and any agent or employee appointed or employed by the Board, shall be subject to removal or suspension by the Secretary at any time. Each and every order, regulation, decision, determination, or other act of the Board shall be subject to the continuing

right of the Secretary to disapprove of the same at any time, and, upon such disapproval, shall be deemed null and void except as to acts done in reliance thereon or in compliance therewith.

(e) *Additional voting requirements.* Adoption of recommendations by the Board with respect to projects pursuant to §981.41 involving production research, marketing research and development projects, and marketing promotion including paid advertising and crediting the pro rata expense assessment obligation of handlers with such portion of their direct expenditures for marketing promotion including paid advertising, shall require at least seven affirmative votes.

* * *

7 C.F.R. § 981.41

§981.41 Research and development.

(a) *General.* The Board, with the approval of the Secretary, may establish or provide for the establishment of projects involving production research, marketing research and development projects, and marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of almonds. The Board may also provide for crediting the pro rata expense assessment obligations of a handler with such portion of his direct expenditure for such marketing promotion including paid advertising as may be authorized. The expenses of such projects shall be paid from

funds collected pursuant to §981.81(a) or credited pursuant to paragraph (c) of this section.

(b) *Authorization.* If, on the basis of a Control Board recommendation pursuant to §981.40(e) with respect to projects pursuant to this section, and appertaining rules and regulations established by the Secretary on recommendation of the Board, and other available information, the Secretary concurs that such activities should be permitted, he shall authorize such activities.

(c) *Creditable expenditures.* The Board, with the approval of the Secretary, may provide for crediting all or any portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products or their uses. No handler shall receive credit for any allowable direct expenditures that would exceed the total of his assessment obligation which is attributable to that portion of his assessment designated for marketing promotion including paid advertising. Such expenditures may include, but are not limited to, money spent for advertising space or time in newspaper, magazines, radio, television, transit, and outdoor media, including the actual standard agency commission costs not to exceed 15 percent: *Provided*, That, with respect to paid advertising, advertising production costs, preparation expenses, travel allowances, and other expenses not directly connected with paid space or time, and costs relating to pretesting of advertising, test marketing, directory advertising, point of sales materials, premiums, and trade promotion allowances shall not be eligible for credit against a handler's assessment obligation.

Appendix I

(d) *Promotion guidelines.* All marketing promotion activity engaged in by the Board, including paid advertising, shall be subject to the following terms and conditions:

(1) No marketing promotion, including paid advertising shall refer to any private brand, private trademark or private trade name;

(2) No promotion or advertising shall disparage the quality, use, value, or sale of like or any other agricultural commodity or product, and no false or unwarranted claims shall be made in connection with the product;

(3) No promotion or advertising shall be undertaken without reason to believe that returns to producers will be improved by such activity; and

(4) Upon conclusion of each activity, but at least annually, the Board shall summarize and report the results of such activity to its members and to the Secretary.

(e) *Rules and regulations.* Before any project involving marketing promotion, including paid advertising and the crediting of the pro rata expense assessment obligation of handlers is undertaken pursuant to this section, the Secretary, after recommendation by the Board, shall prescribe appropriate rules and regulations as are necessary to effectively regulate such activity.

* * *

Appendix I

7 C.F.R. 981.80

§981.80 Expenses.

The Board is authorized to incur such expenses as the Secretary may find are reasonable and likely to be incurred by it during each crop year, for the maintenance and functioning of the Board, including the accumulation and maintenance of an operating reserve fund, and for such purposes as the Secretary may, pursuant to the provisions of this subpart, determine to be appropriate. The recommendation of the Board as to the expenses for each such year, together with all data supporting such recommendation, shall be submitted to the Secretary on or before August 1 of the crop year in connection with which such recommendation is made.

* * *

7 C.F.R. § 981.81

§981.81 Assessment.

(a) *Requirement for payment.* Each handler shall pay to the Board on demand by the Board, from time to time, such sum less any amounts credited pursuant to §981.41, based on such rate per pound of almonds, kernel weight basis, received by him for his own account (except as to receipts from other handlers on which assessments have been paid) as the Secretary finds is necessary to provide funds to meet the authorized board expenses and the operating reserve requirements, and establishes for the crop year. Upon

redetermination of the kernel weight of almonds received by handlers for their own account as provided in §981.61, such redetermined kernel weight for each handler, adjusted for receipts on which assessments have been paid, shall be the basis upon which he shall pay assessments. At any time during or after a crop year, the Secretary may increase the rate of assessments to apply to all such almonds during such crop year to secure sufficient funds to cover the expenses authorized by §981.80 or by any later finding by the Secretary relative to the expenses of the Board, and such additional assessments shall be paid to the Board by each handler on demand. The payment of assessments for the maintenance and functioning of the Board may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) *Refunds.* Any money collected as assessments for either the administrative (maintenance and functioning) or research activities of the Board and not used for the expenses of the applicable crop year, may be used in paying the Board's expenses of the first four months of the succeeding crop year. No later than the fifth month the amount not expended from assessments collected for administrative-research in the previous crop year shall be retained in the operating reserve fund. Any amounts, not credited pursuant to §981.41 for a crop year may be used by the Board for its marketing promotion expenses of the succeeding crop year, and any unexpended portion of those amounts at the end of that crop year shall be retained in the marketing promotion portion of the operating reserve fund. Any funds in each portion of the operating reserve fund in excess of the level

authorized pursuant to paragraph (c) of this section shall be refunded to handlers or used to reduce the assessment rate of the subsequent crop year, as the Board may determine. Each handler's share of a refund shall be the amount by which his payment of assessments exceeds his pro rata share of the two major classifications of Board expenses. For the purpose of computing any refund from the marketing promotion portion, each handler's payment of assessments shall include any amount credited to the handler pursuant to §981.41. In lieu of a refund, each handler may have the amount due him credited to his assessment obligation of the crop year in which the amount would be refunded.

* * *

(d) *Disposition of funds upon termination.* Any money collected from assessments hereunder and remaining unexpended in possession of the Board upon the termination of this part shall be distributed in such manner as the Secretary may direct.

* * *

7 C.F.R. § 981.441

§981.441 Credit for market promotion activities, including paid advertising.

(a) In order for a handler to receive credit for his/her own promotional activities from his/her pro rata portion of advertising assessment payments, pursuant to §981.41(c), the Board must determine that such expenditures meet the

applicable requirements of this section. Credit will be granted either in the form of a payment from the Board, or as an offset to the advertising assessment if activities are conducted and documented to the satisfaction of the Board at least two weeks prior to assessment billings. Credit, hereinafter termed 'Credit-Back', will be granted in an amount not to exceed 66 2/3 percent of a handler's proven expenditures for qualified activities.

(b) The portion of the handler assessment for which credit may be received under this section will be billed, and is due and payable, at the same time as the portion of the handler assessment used for the Board's administrative expenses, unless the handler(s) conduct and document activities at least two weeks prior to assessment billings. In the latter case, handlers' advertising assessment obligations will be reduced according to the amount of proven activities approved by the Board.

(c) The Board shall grant Credit-Back for qualifying activities only to the handler who performed such activities and who filed a claim for Credit-Back in accordance with this section.

(d) Credit-Back shall be granted only for qualified promotional activities which are conducted and completed during the crop year for which Credit-Back is requested.

(e) The following requirements shall apply to Credit-Back for all promotional activities:

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(1) Credit-Back granted by the Board shall be that which is appropriate when compared to accepted professional practices and rates for the type of activity conducted. In the case of claims for Credit-Back activities not covered by specific and established criteria, the Board shall grant the claim if it is consistent with practices and rates for similar activities. To this end, the Board may issue guidelines for qualifying activities from time to time as warranted. For activities in markets other than the United States and Canada, paragraph (e)(5) of this section shall also apply.

(2) The clear and evident purpose of each activity shall be to promote the sale, consumption or use of California almonds, and nothing therein shall detract from this purpose.

(3) No Credit-Back will be given for advertising placed in publications that target the farming or grower trade. No Credit-Back shall be given for any outdoor advertising or sponsorships in the California almond growing counties of Butte, Colusa, Fresno, Glenn, Kern, Madera, Merced, Sacramento, San Joaquin, Stanislaus, and Tulare counties, except that, outdoor advertising in these counties which specifically directs consumers to a handler-operated outlet offering direct purchase of almonds will be eligible for Credit-Back.

(4) Credit-Back shall be granted for those qualified activities specified below, except that Credit-Back for travel expenses will not be allowed in any case.

(i) Paid advertising directed to end-users, trade or industrial users. Credit-Back shall be granted for money spent

on paid advertising space or time including, but not limited to, newspapers, magazines, radio, television, transit and outdoor media, and including the standard agency commission costs not to exceed 15 percent of gross.

(ii) Other market promotion activities. Credit-Back shall be granted for market promotion other than paid advertising, for the following activities:

(A) Marketing research (except pre-testing and test-marketing of paid advertising);

(B) Trade and consumer product publicity;

(C) Printing costs for promotional material;

(D) Direct mail printing and distribution;

(E) Retail in-store demonstrations;

(F) Point-of-sale materials (not including packaging);

(G) Sales and marketing presentation kits;

(H) Trade fairs and exhibits;

(I) Trade seminars;

(J) 50/50 advertising with retailers;

(K) Couponing (printing, distribution and handling costs only);

Appendix 1

(L) Purchase of Board produced promotional materials; and

(M) Sponsorships

(iii) For any qualified activity involving joint participation by a handler and a manufacturer or seller of a complementary product(s), or a handler selling multiple complementary products, including other nuts, with such activity including the handler's name or brand, or the words 'California Almonds', the amount allowed for Credit-Back claim shall reflect that portion of the activity represented by almonds, or the handler's actual payment, whichever is less.

(iv) When products containing almonds are promoted, the amount allowed for Credit-Back shall reflect that portion of the product weight represented by almonds, or the handler's actual payment, whichever is less. In addition, the product must display the handler's name or brand, or the words 'California Almonds' on the primary, face label.

(5) Credit-Back for promotional activities in a foreign market shall be granted at 66 2/3 percent of a handler's unreimbursed expenditures for qualified activities in any foreign market, if the handler is promoting pursuant to a contract with the Foreign Agricultural Service, USDA (FAS) and/or the California Department of Food and Agriculture (CDFA). Such activities must also meet the requirements of paragraphs (e)(1), (2), (3), (4), and (6) of this section. Unless the Board is administering the foreign marketing program, such activities shall not be eligible for Credit-Back unless the handler certifies that he/she was not and will not be

reimbursed by either FAS or the CDFA for the amount claimed for Credit-Back, and has on record with the Board all claims for reimbursement made to FAS and/or the CDFA. Foreign market expenses paid by third parties as part of a handler's contract with FAS or CDFA will not be eligible for Credit-Back.

(6) A handler must file claims with the Board to obtain Credit-Back for promotional expenditures, as follows:

(i) All claims submitted to the Board for any qualified activity must include:

(A) A description of the activity and when and where it was conducted;

(B) Copies of all invoices from suppliers or agencies;

(C) Copies of all canceled checks issued by the handler in payment of these invoices; and

(D) An actual sample, picture or other physical evidence of the activity.

(ii) Handlers may receive credit against their assessment obligation up to the advertising amount of the assessment installment due; *Provided*: That the handler submits the required documentation for a qualified activity at least two weeks prior to the mailing of assessment notices from the Board. In all other instances, handlers must remit the advertising assessment to the Board when billed, and a refund will be issued to the extent of proven, qualified activities.

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(iii) Checks from the Board in payment of approved Credit-Back claims will be mailed to handlers on February 15, April 15, June 15, and 30 days after submission of final claims for the crop year pursuant to paragraph (e)(6)(iv) of this section. To receive payment on these dates, handler claims must be submitted, with all required elements, at least one month prior to the payment date. A handler can receive Credit-Back for his/her allowable direct expenditures only up to the amount of that portion of the handler's assessment designated for marketing promotion, including paid advertising.

(iv) A statement of the Credit-Back commitments outstanding as of the close of a crop year must be submitted in full to the Board within 15 days after close of that crop year. Final claims must be submitted within 105 days after the close of that crop year.

(f) *Appeals.* If a determination is made by the Board staff that a particular promotional activity is not eligible for Credit-Back because it does not meet the criteria specified herein, or for any other reason, the affected handler may request the Public Relations and Advertising Committee to review the Board staff's decision. If the affected handler disagrees with the decision of the Public Relations and Advertising Committee, the handler may request that the Board review the Committee decision. If the handler disagrees with the decision of the Board, the handler, through the Board, may request that the Secretary review the Board's decision. Handlers have the right to request anonymity in the review of their appeal. The Secretary maintains the right to review any decisions made by the aforementioned bodies at his/her discretion.

* * * *

APPENDIX J — PRE-1994 ALMOND MARKETING ORDER ADVERTISING REGULATIONS 7 C.F.R. §§ 981.41 AND 981.441

7 C.F.R. § 981.41

RESEARCH

§ 981.41 Research and development.

(a) *General.* The Board, with the approval of the Secretary, may establish or provide for the establishment of projects involving production research, marketing research and development projects, and marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of almonds. The Board may also provide for crediting the pro rata expense assessment obligations of a handler with such portion of his direct expenditure for such marketing promotion including paid advertising as may be authorized. The expenses of such projects shall be paid from funds collected pursuant to § 981.81(a) or credited pursuant to paragraph (c) of this section.

(b) *Authorization.* If, on the basis of a Control Board recommendation pursuant to § 981.40(e) with respect to projects pursuant to this section, and appertaining rules and regulations established by the Secretary on recommendation of the Board, and other available information, the Secretary concurs that such activities should be permitted, he shall authorize such activities.

(c) *Creditable expenditures.* The Board, with the approval of the Secretary, may provide for crediting all or

any portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products or their uses. No handler shall receive credit for any allowable direct expenditures that would exceed the total of his assessment obligation which is attributable to that portion of his assessment designated for marketing promotion including paid advertising. Such expenditures may include, but are not limited to, money spent for advertising space or time in newspaper, magazines, radio, television, transit, and outdoor media, including the actual standard agency commission costs not to exceed 15 percent: *Provided*, That, with respect to paid advertising, advertising production costs, preparation expenses, travel allowances, and other expenses not directly connected with paid space or time, and costs relating to pretesting of advertising, test marketing, directory advertising, point of sales materials, premiums, and trade promotion allowances shall not be eligible for credit against a handler's assessment obligation.

(d) *Promotion guidelines.* All marketing promotion activity engaged in by the Board, including paid advertising, shall be subject to the following terms and conditions:

(1) No marketing promotion, including paid advertising shall refer to any private brand, private trademark or private trade name;

(2) No promotion or advertising shall disparage the quality, use, value, or sale of like or any other agricultural commodity or product, and no false or unwarranted claims shall be made in connection with the product;

(3) No promotion or advertising shall be undertaken without reason to believe that returns to producers will be improved by such activity; and

(4) Upon conclusion of each activity, but at least annually, the Board shall summarize and report the results of such activity to its members and to the Secretary.

(e) *Rules and regulations.* Before any project involving marketing promotion, including paid advertising and the crediting of the pro rata expense assessment obligation of handlers is undertaken pursuant to this section, the Secretary, after recommendation by the Board, shall prescribe appropriate rules and regulations as are necessary to effectively regulate such activity.

* * *

7 C.F.R. § 981.441

§ 981.141 Crediting for marketing promotion including paid advertising.

(a) In order for a handler to receive credit for his marketing promotion expenditures, including paid advertising, against his pro rata expense assessment obligation pursuant to § 981.41(c), the Board shall determine that such expenditures meet the applicable requirements of this section.

(b) Each paid advertisement must be published, broadcast, or displayed and other marketing promotion

activities must be conducted during the crop year for which credit is requested, except that a handler may receive credit up to a maximum of 40 percent of his total creditable advertising and promotion obligation as of the June 30 redetermination report for expenditures made for advertisements published, broadcast, or displayed and other marketing promotion activities conducted no later than December 31 of the subsequent crop year. A handler utilizing this extension shall: (1) File any required documentation with the Board no later than the following January 31, and (2) certify to the Board, at the time of the June 30 redetermination, his planned expenditures during the extension period.

(c) The following requirements shall apply to crediting for paid advertising:

(1) Credit granted by the Board for paid advertising shall be that which is appropriate when compared to the applicable outlet rate published in the domestic or Canadian catalogs of Standard Rate and Data Service or station, publisher, or outdoor rate cards. In the case of claims for credit not covered by any such source, the Board shall grant the claim if it is consistent with rates for comparable outlets. For advertisements in markets other than the United States and Canada, paragraph (c)(4) of this section shall apply.

(2) The clear and evident purpose of each advertisement shall be to promote the sale, consumption, or use of California almonds, and nothing therein shall detract from this purpose.

(3) Credit for paid advertising shall be granted:

(i) For 100 percent of a handler's payment to an advertising medium: (A) For a generic advertisement of California almonds; (B) for an advertisement of the handler's brand of almonds; (C) when either of these advertisements includes reference to a complementary commodity or product; (D) for a trade media advertisement that displays branded food products containing almonds, or announces a handler's future promotion activities, including joint promotions, and the entire expenditure is borne by the handler; or (E) for in-store supermarket advertisements using fixed position or video media, when such payments are made through an advertising firm; (*1*) Fixed position advertisements must include at least two of the following: (*i*) Processed color displays enclosed in plastic frames and mounted on supermarket shopping carts; (*ii*) overhead directories enclosed in frames placed at the end or middle of supermarket aisles; or (*iii*) processed color advertisements enclosed in frames and mounted on a supermarket shelf; (*2*) Video advertisements must be shown on a fixed video monitor running television commercials, or infomercials for specific products on a rotating basis.

(ii) For an advertisement resulting from joint participation by a handler and a manufacturer or seller of a complementary commodity or product, and including the brands of both, the credit shall be 50 percent of the total allowable payment to the advertising medium, or the handler's payment thereof, whichever is less.

(iii) For an advertisement resulting from joint participation by a handler and manufacturers or sellers of two complementary commodities or products, and including the brands of all three, the credit shall be one-third of the total allowable payment to the advertising medium, or the handler's payment thereof, whichever is less.

(iv) When almond products, other than almond butter, are advertised, the credit shall be 50 percent of the total allowable payment to the advertising medium or 50 percent of the handler's payment thereof, whichever is less: *Provided*, That (A) the almond product does not contain nuts other than almonds, (B) the almond product contains at least 50 percent raw shelled almonds by weight, and (C) the almond product displays the handler's brand. With respect to almond butter advertising, the credit shall be 100 percent of the total allowable payment to the advertising medium or 100 percent of the handler's payment thereof, whichever is less. For the handler to receive credit, the almond butter must meet the specifications contained in § 981.466, and the handler's brand must be displayed.

(4) Credit for media expenditures in a foreign market shall be granted:

(i) For handler's unreimbursed media expenditures for advertising in any foreign market pursuant to a contract with the Foreign Agricultural Service, U.S. Department of Agriculture, and/or the California Department of Food and Agriculture provided the advertisements meet the requirements of paragraphs (c)(2) and (3) if this section and the limitation of paragraphs (c)(5)(i) and (ii) of this section.

(ii) For a handler's media expenditures for brand advertising in Australia, Belgium, Denmark, Finland, France, Great Britain, Hong Kong, Ireland, Italy, Japan, Korea, Luxembourg, the Netherlands, New Zealand, Norway, the Philippines, the People's Republic of China, Singapore, Sweden, Switzerland, Taiwan, and West Germany, credit shall be allowed when claims are substantiated by applicable rate cards. The provisions of this section applicable to domestic advertising shall also apply to the crediting of advertising in these markets.

(5) Credit granted a handler shall be subject to other conditions as follows:

(i) No credit shall be granted to a handler when more than two complementary branded products are included in an advertisement.

(ii) Advertisements which, in addition to promoting California almonds, also mention or promote the sale of noncomplementary commodities or products, or of competing nuts, shall not be eligible for credit.

(iii) Advertisements which direct consumers to one or more named retail outlets, other than handler operated, shall not be eligible for credit.

(6) A handler must file a claim with the Board to obtain credit for an advertising expenditure. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before

October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that documentation will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proof of performance as follows:

(i) For published advertisements, submit a copy of the publication, invoice, agency invoice, if any, and tear sheet of the advertisement.

(ii) For radio advertisements, submit a copy of the station invoice, a copy of the script, or reference to a copy on file with the Board, and the agency invoice, if any.

(iii) For television advertisements, submit a copy of the station invoice, a copy of the script and tape or story board of the advertisement, or a reference to these in the Board files, and the agency invoice, if any.

(iv) For outdoor advertisements, submit a copy of the company invoice, a photograph of the display or a reference to a photograph in the Board files, and the agency invoice, if any.

(v) For in-store supermarket advertising, submit a copy of the company invoice, a copy of the actual advertisement or video tape, a published rate card from a nationally recognized company, and a copy of the agency invoice, if any.

(vi) Each claim shall also include a certification to the Secretary of Agriculture and to the Board that the claim is just and conforms to requirements set forth in § 981.41(c). The Board shall advise the handler promptly of the extent to which such claim has been allowed.

(d) The following requirements shall apply to crediting for marketing promotion other than paid advertising:

(1) Credit for marketing promotion expenditures shall be granted:

(i) For the distribution of sample packages containing one-half ounce or less of almonds to charitable or educational outlets. Such sample packages shall be packed for the Board under its generic label and sold to the distributing handlers at the price paid for them by the Board. Credit shall be based on the price a handler pays the Board for such packages and upon receipt by the Board of acceptable proof of distribution. Such sample packages may or may not be personalized with an individual handler's label. Credit applicable to the distribution of sample packages shall be subject to the following conditions:

(A) A handler may receive credit for 150 percent of the purchase price of such packages against the creditable assessment obligation incurred on the first 4,000,000 redetermined kernel weight pounds received by him during a crop year.

(B) A handler may receive credit for 100 percent of the purchase price of such packages against the creditable

assessment obligation incurred on the second 4,000,000 redetermined kernel weight pounds received by him during a crop year.

(C) No credit shall be granted in excess of the creditable assessment obligation incurred on 8,000,000 redetermined kernel weight pounds received by a handler during a crop year.

(D) No credit shall be granted for sample packages distributed to market segments where almonds are already being sold. Handlers shall obtain approval from the Board prior to distribution to ensure that this condition is met.

(E) No credit shall be applicable to the distribution of sample packages in outlets where they will be used for resale.

(F) Handlers must place written orders for sample packages with the Board no later than February 1 of any crop year except to the extent that handlers use the deferment provision found in paragraph (b) of this section: *Provided*, That for the 1988-89 crop year, handlers must place written orders no later than March 15, 1989. Handlers must place written orders for sample packages with the Board no later than August 15 of any crop year to receive credit for up to 40 percent of their creditable assessment obligations when using the deferment provision pursuant to paragraph (b) of this section.

(G) Handlers must file claims with the Board in order to receive credit for the distribution of sample packages. Except as provided in paragraph (b) of this section, no credit

shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that proof of distribution will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proof of performance. This proof shall consist of a signed statement from the organization to which sample packages were distributed, on that organization's letterhead, stating:

(1) The name and address of the handler from whom the packages were received;

(2) The date of receipt;

(3) The volume of packages received;

(4) How such packages will be used; and

(5) A statement that such packages will not be used for resale.

(ii) For promotion materials available from the Board and sold to handlers at the price paid for them by the Board. Credit shall be granted for the amount a handler pays the Board for such materials upon purchase. Such materials may or may not be personalized with the label of an individual handler.

Appendix J

(iii) For costs directly related to mail order promotion subject to the following conditions:

(A) Credit shall only be granted for the following expenditures:

(*1*) For the purchase of mailing lists to conduct mail order promotions.

(*2*) For the cost of envelopes and postage to mail promotional materials.

(B) Credit for mail order promotion shall be limited to a total of $25,000 per handler per crop year.

(C) Handlers must file claims with the Board in order to receive credit for mail order promotion expenditures. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that proof of performance will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proofs of performance such as invoices or postal receipts.

(e) Credit shall be granted for payments made to the Board for use by the Board for generic marketing promotion

including paid advertising subject to the following conditions:

(1) A handler may receive credit for 150 percent of a payment made to the Board against the creditable assessment obligation.

(2) When a handler elects to use this method of crediting for all or a portion of such handler's assessment obligation, the handler may use the extension provided for pursuant to paragraph (b) of this section for the handler's deferred advertising and promotion obligation.

(3) Handlers must file claims with the Board on ABC Form 31 in order to receive credit for payments made to the Board. No credit shall be granted unless a claim is filed on or before January 31 of the then current crop year: *Provided*, That for the 1988-89 crop year for claims not previously filed on or before January 31, 1989, a claim or supplementary claim must be filed with the Board on ABC Form 31 on or before March 31, 1989. Payments must be made as follows: One-fourth of total claim on or before January 31; one-fourth on or before March 31; one-fourth on or before May 31; and one-fourth on or before June 30 of the then current crop year: *Provided*, That for the 1988-89 crop year, payments not previously made on or before January 31, 1989, must be made as follows: One-third on or before March 31, 1989; one-third on or before May 31, 1989; and one-third on or before June 30, 1989. If the entire amount of the claim is not paid by June 30, or if a handler fails to meet any payment deadline of this paragraph, credit for payment shall revert to the 100 percent basis.

* * * *

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No. 99-1347

In the Supreme Court of the United States

CAL-ALMOND, INC., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether California almond handlers may, consistent with the First Amendment, be required to fund a generic advertising and promotion program for almonds and almond products under an agricultural marketing order that is similar to, but more flexible than, those upheld in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997).

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In the Supreme Court of the United States

No. 99-1347

CAL-ALMOND, INC., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 192 F.3d 1272. The opinion of the district court (Pet. App. 12a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1999. A petition for rehearing was denied on November 12, 1999 (Pet. App. 275a). The petition for a writ of certiorari was filed on February 10, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Almond handlers (*i.e.*, processors and distributors) in the State of California are regulated by a marketing order promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.* The AMAA was enacted "in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities." *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461 (1997) (citing 7 U.S.C. 602(1)).

The AMAA authorizes the Secretary of Agriculture to issue marketing orders for certain commodities, including almonds. 7 U.S.C. 608c(1) and (2). Such marketing orders may include limits on the quantity, quality, grade, and size of the commodity that may be marketed. 7 U.S.C. 608c(6)(A). They may also provide for "production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption" of the commodity. 7 U.S.C. 608c(6)(I). Those projects may—with respect to certain commodities, such as almonds—include "paid advertising." *Ibid.* The projects are funded by mandatory assessments on handlers. *Ibid*; see also 7 U.S.C. 610(b)(2)(ii) (handlers shall pay assessments equal to their pro rata share of expenses of administering marketing orders). The Act provides that the marketing orders for almonds and a few other commodities may authorize a handler to receive credit against its assessment for amounts that it spends on certain advertising of its own. 7 U.S.C. 608c(6)(I).

Before promulgating a marketing order for a commodity, the Secretary of Agriculture must conduct a

formal rulemaking proceeding and, in most cases, obtain approval of the marketing order either from two-thirds of the producers of the commodity covered by the order or from the producers who market two-thirds of the volume of the commodity. 7 U.S.C. 608c(8). The marketing order is administered by a committee, which generally is composed of producers and handlers of the commodity, under the supervision of the Secretary. 7 U.S.C. 608c(7)(C), 610. The Secretary appoints the members of the committee and may remove them at any time. See, *e.g.*, 7 C.F.R. 981.33 and 981.40(d) (relating to the Almond Board of California). The committee recommends an annual budget for administering the marketing order, which may include expenditures for advertising and other promotional activities. The Secretary may accept or reject the recommended budget. 7 U.S.C. 608c(12); 7 C.F.R. 981.38, 981.41. After adopting a budget, the Secretary promulgates a regulation prescribing assessments on handlers to fund the budgeted activities. See 7 U.S.C. 610(c); 7 C.F.R. 981.41(e), 981.80, 981.81(a).

A marketing order must be discontinued in either of two situations. The Secretary of Agriculture must terminate or suspend a marketing order if he finds that it "obstructs or does not tend to effectuate the declared policy" of the AMAA. 7 U.S.C. 608c(16)(A)(i). The Secretary also must terminate a marketing order if he determines that a majority of the producers do not support it. 7 U.S.C. 608c(16)(B).

2. This case concerns the marketing order for California almonds, which is administered by the Almond Board of California, a committee of almond growers and handlers appointed by the Secretary of Agriculture. 7 C.F.R. Pt. 981. Four members of the Almond Board are nominated by cooperative growers

and handlers, four are nominated by independent growers and handlers, and two are nominated by whichever group accounts for more than 50 percent of almonds delivered or handled during the current crop year. 7 C.F.R. 981.31(a)-(f).

Since 1971, the marketing order has authorized the Almond Board to conduct generic advertising and promotion programs for California almonds. See 36 Fed. Reg. 20,887. The marketing order requires that seven members of the Almond Board concur in any proposal to establish or continue a promotional plan, thereby assuring at least some degree of consensus between representatives of the cooperatives and the independents. 7 C.F.R. 981.40(e). The Almond Board's activities, including its generic advertising and promotion programs, are funded by mandatory assessments on handlers based on the volume of almonds that they handle. See 7 C.F.R. 981.41(a), 981.81(a). As authorized by the AMAA, the marketing order permits an almond handler to receive a credit against a portion of its assessment for conducting its own promotional activities, including paid advertising, provided that those activities meet certain regulatory guidelines.

The almond marketing order has contained different provisions at different times with respect to which promotional expenses may qualify for a credit: The "creditable advertising" provision was in place through the 1992-1993 crop year, and the "credit-back" provision has been in place since the 1993-1994 crop year. See 7 C.F.R. 981.441 (Pet. App. 302a-308a); 7 C.F.R. 981.441 (1992) (Pet. App. 311a-321a). Under the creditable advertising provision, almond handlers were allowed a credit of up to 100% for expenditures on qualifying advertising and sample distribution, although no credit was allowed if the advertising mentioned non-

complementary products or nuts other than almonds. 7 C.F.R. 981.441(c)(3) (1992). The current credit-back provision was designed to give almond handlers more flexibility in the types of promotional activities for which they could receive a credit. See 7 C.F.R. 981.441. Under the credit-back provision, almond handlers are allowed a credit of up to 66 2/3 % for expenditures on 14 categories of promotional and public relations activities, including advertising directed at "end-users" or "trade or industrial users," marketing research, retail in-store promotional activities, coupons, and trade fairs. 7 C.F.R. 981.441(a), (e)(4)(ii)(A) through (M).[1]

3. Petitioners are current or former handlers of California almonds. Pet. App. 12a. They challenged, first at the administrative level and then in federal court, the constitutionality of the generic advertising program established under the almond marketing order, including its creditable and credit-back provisions. See *id.* at 139a.

a. An administrative law judge sustained petitioners' challenge. The Department of Agriculture appealed to the judicial officer, who stayed the matter pending this Court's resolution of *Wileman Brothers*. The judicial officer then relied on *Wileman Brothers* to reject petitioners' challenge. Pet. App. 3a-4a, 139a.

b. Petitioners then filed a complaint in United States District Court for the Eastern District of California pursuant to 7 U.S.C. 608c(15)(B). The district court granted the government's motion to dismiss. Pet. App. 12a-21a.

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[1] The credit-back program also allows for a credit for joint promotion of a complementary product, such as trail mix, in an amount up to the portion of the product that is made up of almonds. 7 C.F.R. 981.441(e)(4)(iii).

c. The court of appeals affirmed. Pet. App. 1a-11a.

The court of appeals concluded that the generic advertising program for California almonds, like the generic advertising programs for California tree fruits in *Wileman Brothers*, is part of a "regulatory scheme" in which the growers' and handlers' "freedom to act independently is already constrained." Pet. App. 6a (quoting *Wileman Bros.*, 521 U.S. at 469). The court therefore concluded that this Court's mode of analysis in *Wileman Brothers* was equally applicable to this case. *Id.* at 5a-6a. The court then proceeded to consider whether the generic advertising program for California almonds exhibits the "[t]hree characteristics" that distinguished the generic advertising programs in *Wileman Brothers* from laws that abridge the freedom of speech.

First, the court of appeals concluded that the generic advertising program for California almonds does not impose a restraint on petitioners' freedom to communicate any message to any audience. Pet. App. 6a-7a; see *Wileman Bros.*, 521 U.S. at 469. The court rejected petitioners' argument that the credit provisions render the generic advertising program in this case more constitutionally suspect than the generic advertising program in *Wileman Brothers*. The court explained that the mere fact that a generic advertising program, or particular features of that program, may reduce the amount that a handler would otherwise spend on its own advertising does not amount to a restriction on speech. Pet. App. 7a.

Second, the court of appeals concluded that the generic advertising program for California almonds does not compel any almond handler to engage in actual or symbolic speech. Pet. App. 8a-9a; see *Wileman Bros.*, 521 U.S. at 469. The court rejected petitioners'

argument that the credit provisions create such compulsion, observing that "[h]andlers can decline to advertise directly and simply pay their assessments." Pet. App. 8a. Indeed, said the court, "[r]ather than supporting [petitioners'] assertion that *Wileman* is distinguishable, the flexibility provided by the creditable and credit-back programs instead supports the conclusion that the assessments here are indeed constitutional," because they "potentially limit the extent to which almond handlers must fund advertising to which they object." *Id.* at 8a-9a.

Finally, the court of appeals concluded that the generic advertising program for California almonds does not require handlers to endorse or finance political or ideological views. Pet. App. 9a-10a; see *Wileman Bros.*, 521 U.S. at 469-470. The court observed that petitioners' "objections to the advertising programs and the assessments imposed thereunder do not appear to be ideological or 'to engender any crisis of conscience.'" Pet. App. 10a (quoting *Wileman Bros.*, 521 U.S. at 472). In any event, said the court, even if petitioners' objections were ideological, the generic advertising program would still be constitutionally permissible, because the messages conveyed by the generic advertisements and the individual advertisements for which handlers may receive credit are "germane to the purposes of the Almond Order and the [AMAA]." Pet. App. 9a. The court found that "there can be no dispute that messages, generic or branded, promoting almond sales are germane to the Almond Order's and the [AMAA's] purpose, which is 'to assist, improve, or promote the marketing, distribution, and consumption' of almonds." *Ibid.* (quoting 7 U.S.C. 608c(6)(I)).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. The court of appeals properly applied the First Amendment principles recently set forth by this Court in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), to a generic advertising program that, while similar to the program in *Wileman Brothers*, is more accommodating of the interests of objecting participants. This Court has previously denied a petition for certiorari that presented the same challenge by some of the same petitioners to the same generic advertising program. *Cal-Almond, Inc.* v. *Department of Agriculture*, 525 U.S. 818 (1998). There is no more reason now than there was two years ago for the Court to grant such a petition.[2]

1. This Court held in *Wileman Brothers* that handlers may, as part of a regulatory scheme for the marketing of an agricultural commodity, be required to fund generic advertising for that commodity. The Court identified three characteristics that distinguish such generic advertising programs from laws that abridge the freedom of speech protected by the First Amendment: (1) the programs "impose no restraint on

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[2] Petitioners do not contend that the decision below conflicts with the decision of any other court of appeals. Petitioners do note (Pet. 26) that two courts of appeals have reached different conclusions with respect to the applicability of the *Wileman Brothers* analysis to so-called "stand-alone" marketing programs. Compare *Goetz* v. *Glickman*, 149 F.3d 1131 (10th Cir. 1998), cert. denied, 525 U.S. 1102 (1999), with *United Foods, Inc.* v. *United States*, 197 F.3d 221 (6th Cir. 1999). That dispute, however, has nothing to do with the issues raised by petitioners, could not be addressed in this case, and does not, therefore, provide a reason to grant the petition.

the freedom of any producer to communicate any message to any audience," (2) the programs "do not compel any person to engage in any actual or symbolic speech," and (3) the programs "do not compel the producers to endorse or to finance any political or ideological views," much less views with which they disagree. *Wileman Bros.*, 521 U.S. at 469-470.

As the court of appeals recognized, the generic advertising program for California almonds is distinguishable, for the same three reasons, from laws that have been held to violate the First Amendment. Indeed, the generic advertising program in this case is even further removed from such unconstitutional laws than were the generic advertising programs in *Wileman Brothers*, because handlers of California almonds, unlike handlers of California tree fruits, may receive a credit against their assessments for their own advertising and promotional activities under rules promulgated by the Secretary of Agriculture. See 7 C.F.R. 981.441 (1999) (Pet. App. 302a-308a); 7 C.F.R. 981.441 (1992) (Pet. App. 311a-321a). In *Wileman Brothers*, three of the dissenting Justices observed that such a credit mechanism, "[o]n its face, at least," would be "a far less restrictive and more precise way to achieve the Government's stated interests [in promoting an agricultural commodity], eliminating as it would much of the burden on [handlers'] speech without diminishing the total amount of advertising for a particular commodity." 521 U.S. at 502 (Souter, J., dissenting) (noting that the AMAA authorizes such credits for, *inter alia*, almonds, although not for tree fruits).

Petitioners nonetheless contend (Pet. 22-25) that such credit mechanisms render the generic advertising program here more constitutionally problematic, in

three respects, than the generic advertising programs in *Wileman Brothers*. Petitioners are mistaken.

First, the almond marketing order does not, as petitioners assert (Pet. 22), "impose a restraint on the freedom of the producer to communicate the message of his choice to the public." A handler is free under the almond marketing order to communicate any message that it chooses. See 7 U.S.C. 608c(10) (no marketing order may "prohibit[], regulat[e], or restrict[] the advertising of any commodity or product"). The marketing order simply limits the types of advertising for which an almond handler may receive a credit against its assessment for the generic advertising program. An almond handler who chooses to engage in advertising that is not eligible for a credit is thus in precisely the same position as *every* fruit handler in *Wileman Brothers*, which involved marketing orders that, as noted above, did not contain any credit mechanism. The Court recognized in *Wileman Brothers* that the mere fact that assessments for generic advertising "may indirectly lead to a reduction in a handler's individual advertising budget does not itself amount to a restriction on speech." 521 U.S. at 470.

Second, the almond marketing order does not, as petitioners assert (Pet. 24), "compel handlers to engage in actual speech." A handler is free under the marketing order to refrain from engaging in any speech whatsoever. To be sure, such a handler, like *every* handler in *Wileman Brothers*, must pay the full amount of its assessment under the marketing order, without any credit for its own advertising. But *Wileman Brothers* rejected the argument that a requirement to contribute to a generic advertising program constitutes "compelled speech." See 521 U.S. at 470-471 ("The use of assessments to pay for advertising does not require

[handlers] to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they would prefer to remain silent, or require them to be publicly identified or associated with another's message.") (internal quotation marks and citation omitted).[3]

Third, the almond marketing order does not, as petitioners assert (Pet. 24-25), "vest the power to exercise subjective judgments about the content of private speech in a non-neutral decisionmaker," Blue Diamond. Under the marketing order, any almond marketing program, including its credit mechanism, must be approved by at least seven members of the Almond Board. 7 C.F.R. 981.40(e). Neither cooperatives (such as Blue Diamond) nor independents can ever hold more than six seats on the Almond Board. 7 C.F.R. 981.31. More importantly, the final decision concerning marketing programs or credit mechanisms rests not with the Almond Board but with the Secretary of Agriculture,

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[3] Nor do the credit provisions of the almond marketing order even encourage, much less require, any handler to endorse or finance an ideological message. See *Wileman Bros.*, 521 U.S. at 469-470. Those provisions do not distinguish between advertising messages based on their ideological content. See *id.* at 473 (noting that advertising to promote a commodity is not "ideological"). They instead distinguish between advertising messages based on whether, in the view of the Almond Board and ultimately the Secretary of Agriculture, they "promote the sale, consumption or use of California almonds," 7 C.F.R. 981.441(e)(2)—*i.e.*, whether the individual advertising for which the handler seeks a credit is comparable, for purposes of the government's interest in promoting almonds, to the generic advertising for which the handler would otherwise be required to contribute. The credit provisions are thus directly "'germane' to the purpose for which compelled association was justified." *Wileman Bros.*, 521 U.S. at 473.

an impartial decisionmaker. 7 C.F.R. 981.441(f). Cf. *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 308 (1986) (finding a procedure inadequate that vested the union, an interested party, with sole control over complaints that agency fees were used to fund ideological speech).

2. Petitioners also contend (Pet. 20) that the almond marketing order imposes a "content-based financial burden on commercial speech," and thus should be evaluated not under *Wileman Brothers*, but instead under the three-part test announced in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 564 (1980). As *Wileman Brothers* made clear, however, *Central Hudson*, a case involving *restrictions* on commercial speech, is inapplicable in cases, such as this one, involving *compelled funding* of commercial speech under a "collective action program." *Wileman Bros.*, 521 U.S. at 474 (observing that "the *Central Hudson* test is inconsistent with the very nature and purpose" of such programs); see also *id.* at 469 & n.12 (explaining that such programs are distinguishable from the regulation at issue in *Central Hudson* because they "impose no restraint on the freedom of any producer to communicate any message to any audience").[4] The mere fact that petitioners,

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[4] Petitioners thus err in asserting that "the decision below conflicts with this Court's holdings" in cases such as *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996), *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *Central Hudson* itself. Pet. 17, 19 (capitalization omitted). Those cases involved a complete ban on a variety of commercial speech, either generally or in a particular context. The almond marketing order, in contrast, imposes no restriction whatsoever on the commercial speech in which handlers may engage.

unlike the handlers in *Wileman Brothers*, may satisfy their "compelled funding" obligation either by paying the full assessment or by engaging in their own creditable advertising does not bring this case within the reach of *Central Hudson* or other cases finding content-based restrictions on speech to be unconstitutional.[5]

3. The Court has had two previous opportunities to consider, on the merits, the applicability of *Wileman Brothers* to the almond marketing order. The Court declined both opportunities.

a. In 1996, the Secretary of Agriculture filed a petition for a writ of certiorari in *United States Department of Agriculture* v. *Cal-Almond, Inc.*, No. 95-1879 (*Cal-Almond I*), which challenged the Ninth Circuit's earlier decision that the almond marketing order violated the First Amendment under the *Central Hudson* standard. See *Cal-Almond, Inc.* v. *United States Dep't of Agriculture*, 14 F.3d 429 (1993), opinion after remand, 67 F.3d 874 (9th Cir. 1995), cert. denied, 519 U.S.

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[5] The dissenting Justices in *Wileman Brothers* surely understood that any marketing order that gave handlers credit for their own advertising could permissibly be content-based. Otherwise, a business that handled almonds and multiple other commodities could receive a credit against its assessment under the almond marketing order for its advertising of all of those commodities, whether or not the advertising had anything to do with almonds. Such a content-neutral credit, which is the only sort of credit that petitioners' theory would permit, would not serve the governmental interest, underlying the marketing order, of promoting a particular commodity. Cf. *Wileman Bros.*, 521 U.S. at 502 (Souter, J., dissenting) (explaining that credit mechanisms, such as that authorized under the AMAA for almonds, "achieve the Government's stated interests," because they do not "diminish[] the total amount of advertising *for a particular commodity*") (emphasis added).

819 (1996). The Secretary explained that a similar First Amendment issue was already pending before the Court in *Wileman Brothers*, which "provide[d] a more appropriate vehicle for resolution of [that] issue," and therefore asked the Court to hold the petition in *Cal-Almond I* while considering the petition in *Wileman Brothers*. Pet. at 16-17, *Cal-Almond I*, *supra*.

On June 27, 1997, two days after the Court issued its decision in *Wileman Brothers*, the Court granted the Secretary's petition in *Cal-Almond I*, vacated the Ninth Circuit's judgment, and remanded the case to the Ninth Circuit "for further consideration in light of [*Wileman Brothers*]." *Department of Agriculture* v. *Cal-Almond, Inc.*, 521 U.S. 1113, 1113-1114 (1997). The remand order suggests that the Court understood that the constitutionality of the almond marketing order, including its credit mechanism, is governed by *Wileman Brothers*, not *Central Hudson*.

b. In 1998, after the Ninth Circuit, citing *Wileman Brothers*, remanded the case to the district court with instructions to dismiss the First Amendment claim, various almond handlers, including some of the petitioners here, petitioned for a writ of certiorari in *Cal-Almond, Inc.* v. *United States Department of Agriculture*, No. 97-1935 (*Cal-Almond II*). That petition argued, as does the petition in this case, that the almond marketing order is distinguishable from the marketing orders in *Wileman Brothers* because an almond handler, unlike the handlers of tree fruits in *Wileman Brothers*, may receive a credit against its assessment for certain advertising of its own.[6] The Court denied the petition. *Cal-Almond II*, 525 U.S. 818

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[6] The earlier *Cal-Almond* case involved only the credit provision that was in effect before the 1993-1994 crop year.

(1998). No intervening decision of this Court or any court of appeals provides any reason to do otherwise here.

4. Finally, petitioners' challenge to the almond marketing order implicates no issue of general significance. That challenge is predicated solely on availability of a mechanism, which was not available in *Wileman Brothers*, whereby a handler may receive a credit against its assessment for its own advertising. Although the AMAA and three marketing orders authorize the Secretary of Agriculture to implement credit mechanisms for certain other commodities,[7] we have been informed by the Department of Agriculture that no credit mechanism is actually in effect (or has been in effect in recent years) for any other commodity. Accordingly, if the Court were to grant the petition for certiorari in this case, the Court's decision on the merits would have no tangible effect outside the California almond industry.

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[7] See 7 U.S.C. 608c(6)(I); see also 7 C.F.R. 932.45(a)(2) ("The committee, with the approval of the Secretary, *may* provide for crediting a portion of a [California olive] handler's direct expenditures for paid brand advertising for olives.") (emphasis added); 7 C.F.R. 982.58 (hazelnuts or filberts grown in Oregon or Washington); 7 C.F.R. 989.53(b) (California raisins).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2000

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In the Supreme Court of the United States

CAL-ALMOND, INC., FRAZIER NUT FARMS, INC., BAL NUT, INC., CENTRAL VALLEY GROWER PACKING, HOCKER NUT FARM, JARDINE ORGANIC RANCH, ROTTEVEEL ORCHARDS, THERON SHAMGOCHIAN INC., BEARDS QUALITY NUT CO., AMARETTO ORCHARDS, AND CARLSON FARMS,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

As petitioners explained in their opening brief, the challenged almond marketing order — under which the government selects a message for private industry members and imposes financial penalties on members who refuse to convey that message — is irreconcilable with the First Amendment's protected "marketplace of ideas." See Pet. 17-21. It violates the fundamental premise that, under our Constitution, "the speaker and the audience, not the government, assess the value" of commercial speech. *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993). It violates the principle that "official scrutiny of the content of [speech] as the basis for imposing a tax is entirely incompatible with the First Amendment * * *." *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 230 (1987). And because the program is set up to benefit a single, dominant industry member at the expense of its competitors, it violates the premise that a majority may not harness the government's power to force a minority to fund its message. See *Board of Regents of Univ. of Wisconsin* v. *Southworth*, 120 S. Ct. 1346, 1357 (2000).

The government virtually ignores these arguments, claiming that *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), gives it a blank check for mandatory advertising. Br. in Opp. 8-10, 13-14. But its assertion that *Wileman* permits virtually unlimited restrictions on commercial speech, so long as they are imposed indirectly through content-based taxes rather than directly through speech bans, merely highlights the need for this Court's review. Equally in conflict with this Court's decisions, and equally deserving of its review, is the government's contention that the First Amendment permits a biased decisionmaker to impose financial penalties on the basis of the content of one's speech, so long as one is permitted an eventual right of review. The government's attempts to defeat review on procedural and prudential grounds are insubstantial.

1. The basic premise of the government's argument is that if *Wileman* permits it to require *all* industry members to contribute to an advertising program, then it must also permit a "more flexible" program under which only *some* industry members — those who have not conveyed the government's chosen message in their own advertisements — are required to contribute (or to contribute more). Br. in Opp. I. The government deems the almond marketing order's content-based assessments to be "more accommodating of the interests of objecting participants" than the advertising program at issue in *Wileman*, because the almond marketing order offers handlers a choice between speaking the approved message themselves and funding the Almond Board's expression of that message. *Id.* at 8, 10-11.

If the government's analysis were correct, then its undisputed authority to tax newspapers and magazines would also permit it to tax just those newspapers and magazines that refused to print pro-government articles. Cf. *Arkansas Writers' Project*, 481 U.S. at 229-232. After all, a content-based tax on publications would permit editors the "flexibility" to choose between printing pro-government articles and paying the tax. Each editor would be "free * * * to refrain from engaging in [pro-government] speech" — although each dissenting editor would, as here, be subject to the results of that choice, mandatory payment of "the full amount of its assessment." Br. in Opp. 11. In the context of free speech, the greater power does *not* imply the lesser: narrower, content-based restrictions are more dangerous than broad, neutral restrictions.

Notably, the only support the government cites for its radical position is the holding in *Wileman*. Br. in Opp. 9-10, 13-14. Yet the government fails to explain how the reasoning of that decision supports it, given *Wileman*'s express recognition that heightened scrutiny applies to marketing orders that "impose [a] restraint on the freedom of any producer to communicate any message to any audience" or that "compel any person to engage

in any actual or symbolic speech." 521 U.S. at 469-470. The almond marketing order limits an almond handler's freedom to communicate the advertising message of its choice by attaching financial consequences to its selection of a particular message. See Pet. 17-24. Almond handlers whose advertisements convey the government's chosen message are charged lower assessments than almond handlers whose advertisements contain their own, unapproved message. An almond handlers is thus compelled to advertise the government's message, on penalty of a higher assessment.

The government blithely asserts (at Br. in Opp. 10-11, 13 n.4) that the almond market order "imposes no restriction whatsoever on the commercial speech in which handlers may engage" because a "handler is free under the almond marketing order to communicate any message that it chooses" and to "refrain from engaging in any speech whatsoever." In so arguing, however, it ignores the "significant burden on expressive activity" imposed by the marketing order's financial incentives and disincentives. *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 468-469 (1995); see also *American Communications Ass'n* v. *Douds*, 339 US. 382, 402 (1950) ("indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes"). As we explained in our opening brief, and as this Court has repeatedly held, the use of content-based financial incentives to regulate speech is every bit as constitutionally offensive as are content-based bans. See Pet. 18-20 (collecting cases). The government does not cite or discuss a single one of these cases, and nothing in *Wileman*, on which the government erroneously relies, contradicts or limits the principle that content-based financial penalties on speech warrant heightened scrutiny.

The government improperly relies on Justice Souter's dissenting opinion in *Wileman* as support for its argument that the almond marketing order must be constitutional. Br. in Opp.

10, 14 n.5. In dissent, Justice Souter noted that, "*[o]n its face,* at least, a credit system would be a far less restrictive and more precise way to achieve" the government's purported interest in increasing demand for California peaches, plums, and nectarines. 521 U.S. at 502 (emphasis added). And we do not contest that, *on its face*, the credit system described in 7 U.S.C. § 608c(6)(I) — under which an almond marketing order "may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising" — could satisfy constitutional scrutiny. But here, the regulations impose additional, content-based limitations on what advertising is creditable, the purpose and effect of which, as the Ninth Circuit noted, is "to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers." *Cal-Almond, Inc.* v. *U.S. Dep't of Agric.*, 14 F.3d 429, 440 (9th Cir. 1993); see also Pet. 10-12.[1]

2. Notably, the government makes no attempt to defend the almond marketing program under *Central Hudson Gas &*

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[1] Under both pre-1994 and current regulations, for example, an almond receives credit for advertising a product containing almonds only if that product displays the handler's brand or, under the current regulations, the words "California Almonds." See 7 C.F.R. § 981.441(c)(3)(iv)(C) (1992); 7 C.F.R. § 981.441(e)(iii)-(iv) (1994). Yet most almond handlers other than Blue Diamond sell their almonds to food manufacturers rather than to retail customers; California almonds constitute well over 99% of all almonds consumed domestically; and Blue Diamond supplies approximately 90% of the domestic retail market. See Pet. App. 158a, 165a-213a, 217a; ALMOND BOARD OF CALIFORNIA, ALMOND ALMANAC 20 (1999); U.S. Dep't of Agric., Foreign Agricultural Service, "Almond Situation and Outlook," <http://www.fas.usda.gov/htp2/circular/1997/97-10/almonds.htm>. Accordingly, public awareness of a specific handler's "brand," or of the "California Almonds" brand, is of no value to handlers other than Blue Diamond. Because food manufacturers are reluctant to incur the trouble and expense of changing their labels to include the almond handler's brand name or "California Almonds," however, these requirements create an additional obstacle to receiving credit.

Electric Corp. v. *Public Service Commission*, 447 U.S. 557 (1980), effectively conceding that the "challenged regulations do not even come close to satisfying" the heightened level of scrutiny applied to restrictions on commercial speech. See Pet. 20-21. Cf. Br. in Opp. at 13-14. Nor could it. The ALJ's findings in this regard were crystal clear: the government's interest in furthering demand for almonds is not furthered by the challenged advertising program because the "essential purpose" of that program is not to engage in generic advertising and promotion for the benefit of the almond industry but instead to further the interests of the dominant producer, Blue Diamond. See Pet. 20-21.

3. The government also contests (Br. in Opp. 12) our assertion that the almond marketing order vests effective control over the program in the hands of a biased decisionmaker — a single, dominant industry member, Blue Diamond. According to the government, the rules requiring a seven-member majority to make any changes in the almond marketing order effectively prevent Blue Diamond from taking control. *Ibid.* "More importantly," the government claims, the existence of a right of appeal to the Secretary of Agriculture cures any constitutional defect in delegating authority to a biased decisionmaker. *Ibid.*

These arguments fall far short of the mark. The supermajority requirement on which the government relies applies only to *changes in the almond marketing order itself.* This is irrelevant to our constitutional argument, which has to do with allowing a biased decisionmaker to *administer* an order under which it reviews the content of its competitors' speech and imposes financial assessments based on that review. See Pet. 24-25. The government does not dispute that Blue Diamond controls administration of the order.

Moreover, since it is petitioners who seek to change the marketing order (and Blue Diamond who benefits from its current shape), the supermajority requirement for changes in the

marketing order only serves to *consolidate* Blue Diamond's power — not to check it. As the ALJ found, and as the government concedes by its silence, the almond marketing order has the purpose and effect of benefitting Blue Diamond at the expense of its competitors. See Pet. 10-12; see also *Cal-Almond*, 14 F.3d at 440 ("[T]here seems to be no logical justification for [the restrictions on creditability imposed by the pre-1993 regulations] other than * * * to benefit Blue Diamond * * * at the expense of smaller handlers * * *."). The supermajority requirement ensures that Blue Diamond, which is guaranteed four seats on the ten-member Board as the dominant cooperative producer, see Pet. 5 n.1, maintains veto power over any proposed changes.

Nor are these constitutional defects cured because aggrieved handlers have a right to appeal to the Secretary. Cf. Br. in Opp. 12. First, aggrieved handlers have no appeal of right; any appeal is wholly within the Secretary's discretion. See 7 C.F.R. § 981.441(f) (1994). Second, the right to appeal an adverse decision to the Secretary, which cannot even be pursued until an aggrieved handler has first exhausted two levels of administrative appeal to the Board, does not satisfy the First Amendment requirement of a "reasonably prompt decision by an impartial decisionmaker." *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 307-308 (1986). Under the government's theory, any and all defects in the administrative process of the order — however blatantly unconstitutional — would be exempt from constitutional review, since everything is subject (theoretically) to the Secretary's discretionary oversight.

4. In addition to defending the substance of the decision below, the government argues that our petition for certiorari should be denied because (i) this Court has already considered the substantive issues it presents and has decided that they do not warrant further review; and (ii) the case "implicates no issue

of general significance." Br. in Opp. 14-16. Neither contention is correct.

a. The government claims that this Court's decision (two days after issuance of the decision in *Wileman*) to grant the petition in *United States Department of Agriculture* v. *Cal-Almond, Inc.*, No. 95-1879, vacate the Ninth Circuit's decision in that case, and remand for further consideration in light of *Wileman* ("GVR"), suggests "that the Court understood that the constitutionality of the almond marketing order, including its credit mechanism, is governed by *Wileman Brothers*, not *Central Hudson*." Br. in Opp. 14-15. With all respect, one would think that the Solicitor General would have a more accurate understanding of the meaning of a GVR order.

As the Court explained in *Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964), a GVR order "d[oes] not amount to a final determination on the merits." *Id.* at 777. To the contrary, the Court issues a GVR order because it has *not* conducted plenary review, and has *not* concluded that reversal is warranted. *Id.* at 776; see also, *e.g.*, *Lawrence* v. *Chater*, 516 U.S. 163, 174 (1996) ("[I]t is precisely because we are uncertain, without undertaking plenary analysis, of the legal impact of a new development * * * that we GVR."). A GVR order is appropriate whenever there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167-168; accord *Lords Landing Village Condominium Council of Unit Owners* v. *Continental Ins. Co.*, 520 U.S. 893, 896 (1997). A "reasonable probability" that an intervening decision "may" change the outcome is not, as the government implies, a reversal on the merits. See, *e.g.*, *Graham* v. *Collins*, 506 U.S. 461 (1993) (granting certiorari in a case that had earlier been GVRed).

The government also claims that our petition should be denied because it raises the same issues as the petition for certiorari in *Cal-Almond, Inc.* v. *United States Department of Agriculture*, No. 97-1935, which was denied by this Court. 525 U.S. 818 (1998). Just two years ago, however, the government argued that the petition in No. 97-1935 should be denied because the pre-1993 almond marketing order had been amended and "the constitutionality of the revised regulation [wa]s not at issue"; accordingly, the government claimed, the constitutionality of the pre-1993 regulations was an issue of "no continuing importance." U.S. Brief in Opposition at 14-15, *Cal-Almond, Inc.* v. *U.S. Dep't of Agric.*, No. 97-1935 (filed July 1998). Here, in contrast, Cal-Almond challenges both pre-1993 and *current* versions of the almond marketing order — and thus the government's argument in the earlier case is inapplicable.

Moreover, the government ignores the interlocutory posture of the earlier petition. As Justice Scalia noted in his opinion regarding the denial of certiorari in *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) — and as that case aptly demonstrates — denial of a petition at an interlocutory stage does not "preclude [a party] from raising the same issues in a later petition, after final judgment has been rendered." *Id.* at 946 (collecting cases); *United States* v. *Virginia*, 516 U.S. 910 (1995) (granting subsequent petition for a writ of certiorari).

b. The government's claim that our challenge to the almond marketing order "implicates no issue of general significance" (Br. in Opp. 16) is erroneous. Although the government asserts (without cited support) that "no credit mechanism is in effect (or has been in effect in recent years) for any other commodity," it concedes that credit programs are authorized by the governing statute and regulations for commodities such as olives, hazelnuts, filberts, and raisins. See Pet. 25-26. Any one or more of these programs could be implemented, and a challenge to each of them would be governed by the Ninth Circuit's decision below.

More fundamentally, the decision below warrants further review regardless of its impact on other credit-based advertising programs. The decision below resolved a question of federal constitutional law in a manner that conflicts with this Court's prior decisions. Cf. SUPREME COURT RULE 10(c). The challenged marketing order imposes substantial financial burdens (on the order of $8.5 million annually) on a sizable group of handlers (100 or more). See Pet. 4. These real-world consequences are at least as significant as the effects of the challenged decision in other First Amendment cases in which this Court has granted review. *E.g.*, *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995); *City of Dallas* v. *Stanglin*, 490 U.S. 19 (1989); *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984); *Linmark Assocs., Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977); *Cohen* v. *California*, 403 U.S. 15 (1971).

Finally, any doubt about the importance of this case is eliminated by the government's own brief and the sweeping interpretation of *Wileman* on which it relies. As we have explained (at pages 2-3, *supra*), the government's reading of *Wileman*, which was accepted by the court below, would permit it virtually unlimited power to compel or restrict commercial speech. Under the government's expansive interpretation, *Wileman* marked a sharp turn away from this Court's prior First Amendment jurisprudence and, at least in the context of commercial speech, abrogated or overruled dozens of cases. As we explained in our Petition, the disagreement between Cal-Almond and the government over the proper scope of the *Wileman* holding mirrors the widespread confusion among the lower courts and commentators about the decision. See Pet. 26-27. The government is simply wrong in declaring that the issues presented here lack "general significance."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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